

No. 12573

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United States  
Court of Appeals  
for the Ninth Circuit.

—  
G. CLIFFORD SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

—

Transcript of Record

—

Appeal from the United States District Court  
District of Arizona.

**FILED**

OCT - 4 1950

**PAUL P. O'BRIEN,**  
CLERK



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Court of Appeals  
for the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

H. C. WHEELER, Esquire,

111 West Alameda,  
Tucson, Arizona,

IRVING KIPNIS, Esquire,

52 West Alameda,  
Tucson, Arizona,

Attorneys for Appellant.

F. E. FLYNN, Esquire,

United States Attorney,  
Federal Building,  
Tucson, Arizona,

Attorney for Appellee.

## COMMISSIONER'S RECORD

District Court of the United States, District of  
Arizona, Tucson Division

GJ-11736 Tuc.

Commissioner's Docket No. 2

Case No. 594

UNITED STATES OF AMERICA,

vs.

G. CLIFFORD SMITH.

Complaint for Violation of U.S.C. Title 19

Section 1001

Before: Thomas H. McKay,

U. S. Commissioner at Tucson, Arizona.

The undersigned complainant being duly sworn states:

That on or about March 18, 1949, at Tucson, Arizona, in the District of Arizona, G. Clifford Smith did unlawfully, wilfully and knowingly submit a voucher for payment to the Veterans Administration for tools and books in the amount of \$700 as having been issued to seven students of the Arizona Institute of Aeronautics when in truth and in fact tools and books had been issued by said Institute to said students in a lesser amount.

And the complainant further states that he believes that Merle Moore, CPA, 11 E. Pennington St., Tucson, Arizona; Paul R. Ehlers, Arizona Institute of Aeronautics, Tucson, Arizona, are material witnesses in relation to this charge.

/s/ LEWIS W. KOLDEWEY,  
Special Agent, FBI.

Sworn to before me, and subscribed in my presence, May 23, 1949.

[Seal] /s/ THOMAS H. McKAY,  
United States Commissioner.

[Title of District Court and Cause.]

Warrant of Arrest

To U. S. Marshal, Dist. of Arizona, or any other officer authorized to serve this process:

You are hereby commanded to arrest G. Clifford Smith, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with submitting a voucher to the Veterans Administration for payment for tools and books in an amount greater than furnished by defendant, in violation of U.S.C. Title, 18, Section 1001.

Date May 23, 1949.

[Seal] /s/ THOMAS H. McKAY,  
United States Commissioner.

## Return

Received May 23, 1949, at Tucson, and executed by arrest of G. C. Smith, at 2200 E. Glen, Tucson, on May 25, 1949.

/s/ LEWIS W. KOLDEWEY,  
Special Agent, F. B. I..

Date May 25, 1949.

[Title of District Court and Cause.]

Complaint for Violation of U. S. C. Title 18,  
Section 1001

Before Thomas H. McKay,

U. S. Commissioner at Tucson, Arizona.

The undersigned complainant being duly sworn states:

That on or about March 18, 1949, at Tucson, Arizona, in the District of Arizona, G. Clifford Smith, did unlawfully, wilfully and knowingly submit a voucher for payment to the Veterans Administration for tools and books in the amount of \$700 as having been issued to seven students of the Arizona Institute of Aeronautics, when in truth and in fact tools and books had been issued by said Institute to said students in a lesser amount.

And the complainant further states that he believes that Merle Moore, CPA, 11 E. Pennington St., Tucson, Arizona; Paul R. Ehlers, Arizona Institute of Aeronautics, Tucson, Arizona, are material witnesses in relation to this charge.

/s/ LEWIS W. KOLDEWEY,  
Special Agent, FBI.



Proceedings on First Presentation of Accused to  
Commissioner:

Date May 25, 1949. Arrested by FBI, on warrant  
of Thomas H. McKay.

Appearances:

K. BERRY PETERSON,  
U. S. Attorneys Office,  
For United States.

HAROLD WHEELER,  
111 W. Alameda St.,  
For Accused.

Proceedings taken: Complaint was duly read and  
explained to accused who stated he understood the  
charge against him. Counsel requested preliminary  
hearing which was set for June 2, 1949.

Outcome: Matter continued to June 2, 1949, for  
preliminary hearing.

Bail fixed May 25, 1949. Amount, \$1,000.00.  
Bonded May 25, 1949, by surety, G. Clifford Smith,  
Elizabeth O. Smith, 2200 E. Glen, Tucson, Edward  
B. and Jean M. Thompson, 2128 E. Copper, Tucson,  
who justified by affidavit dated May 25, 1949.

Subpoenas for Witnesses Issued:

May 27, 1949, for John P. Burke, Wm. McCon-  
nell, Edward Scruggs, Fred W. Streitcher, Capt.  
John A. Wylie, Jr., at request of defendant.

Substance of return: Rec'd May 31, 1949, and executed by service same date.

EDMUND L. SCWEPPE,  
Deputy Marshal.

May 31, 1949, for Joaquin C. Urbano, Paul R. Ehlers, James E. Krug, Thomas L. Beck, Antonio V. Bustamente, Albert L. Thomale, Merle W. Moore, Oscar M. Gomez, at request of United States of America.

Substance of return: Rec'd. May 31, 1949, and executed by service on June 1, 1949.

SCHWEPPE,  
Deputy.

Preliminary Examination:

Date, June 2, 1949.

Appearances:

K. BERRY PETERSON,  
U. S. Attorneys Office,  
For United States,

HAROLD WHEELER,  
111 W. Alameda St.,  
For Accused.

Witnesses For United States:

Oscar W. Gomes, 332 E. Penn. Drive, Tucson,

Albert L. Thomale, 4136 Santa Barbara, Tucson; Antonio V. Bustamente, 140 E. 33rd St., Tucson; Thomas L. Beck, 132 W. Delano, Tucson; James E. Krug, 725 E. 38th St., Tucson; Joaquin C. Urbano, 4526 S. 11th Ave., Tucson; Paul R. Ehlers, 1644 E. 12th St., Tucson; Merle W. Moore, 11 E. Pennington, Tucson.

Witness payroll containing 8 names certified to United States Marshal for payment June 2, 1949.

Proceedings taken: Preliminary hearing held. Counsel thereafter advised that Grand Jury action would not be waived.

Outcome: Accused held for Grand Jury.

Bail fixed, June 2, 1949. Amount \$1,000. Bonded as hereinafter set forth, and that bond continued.

Certified to be a correct transcript.

Made this 2nd day of June, 1949.

Transmitted to Clerk of United States District Court for the ..... district of Arizona, Tucson Division, June 3, 1949.

.....

United States Commissioner.



District Court of the United States  
District of Arizona  
Tucson Division

Commissioner's Docket No. 2  
Case No. 594

UNITED STATES OF AMERICA,

vs.

G. CLIFFORD SMITH.

Temporary Commitment of G. Clifford Smith

To the United States Marshal of the . . . . . District  
or Arizona :

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within this district approved by the Attorney General of United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant has been arrested but not yet fully examined by me upon the complaint of Lewis W. Koldewey, charging that on or about March 18, 1949, at Tucson, in the District of Arizona, the defendant did unlawfully make a false voucher for payment by the Veterans Administration, in violation of U.S.C. Title 18, Section 1001; and he has been directed to furnish bail in the sum of One Thousand dollars (\$1,000.00) for his appearance before me at Tucson, Arizona, in accordance with all



In the District Court of the United States  
For the District of Arizona

C-11697 Tucson

INDICTMENT

Viol: 18 USC 287 (False claim against Gov't.)

United States of America,  
District of Arizona—ss:

In the District Court of the United States in and for the District of Arizona, At the April term thereof, A.D. 1949.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that G. Clifford Smith, on or about the 25th day of March, A.D., 1949, and within the said District of Arizona, presented and caused to be presented to the Veterans Administration, an Agency of the United States of America, for payment, a claim in the name of and on behalf of the Arizona Institute of Aeronautics, a corporation, in the amount of Seven Hundred (\$700.00) Dollars against the Government of the United States, for books and tools claimed to have been furnished to Albert L. Thomale, James E. Krug, Antonio V. Bustamente, Oscar M. Gomez, Joseph L. Gargano, Thomas L. Beck and Joaquin C. Urbano, who were then and there, or had been trainees at the said Arizona Institute of Aeronautics, in the amount and of the value of

One Hundred (\$100.00) Dollars to each of said trainees, and that said defendant then and there knew the claim to be fraudulent in that the said Arizona Institute of Aeronautics had not furnished the said trainees or either of them tools and books in the amount of and in the value of One Hundred (\$100.00) Dollars each, or in the total amount of Seven Hundred (\$700.00) Dollars.

Second Count: And the Grand Jury further charges that G. Clifford Smith, on or about the 19th day of April, A.D., 1949, and within the said District of Arizona, presented and caused to be presented to the Veterans Administration, an Agency of the United States of America, for payment, a claim in the name of and on behalf of the Arizona Institute of Aeronautics, a corporation, in the amount of Three Hundred (\$300.00) Dollars against the Government of the United States, for books and tools claimed to have been furnished to Charles R. Hunt, George E. Patterson and Charles L. Gadbois, who were then and there, or had been, trainees at the said Arizona Institute of Aeronautics, in the amount and of the value of One Hundred (\$100.00) Dollars to each of said trainees, and that said defendant then and there knew the claim to be fraudulent in that the said Arizona Institute of Aeronautics had not furnished the said trainees or either of them tools and books in the amount of and in the value of One Hundred (\$100.00) Dollars each, or in

the total amount of Three Hundred (\$300.00) Dollars.

F. E. FLYNN,  
United States Attorney for  
the District of Arizona,

/s/ K. BERRY PETERSON,  
Assistant.

/s/ W. L. ALBION,  
Foreman of the Grand Jury.

[Endorsed]: Filed June 16, 1949.

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In the District Court of the United States  
In and For the District of Arizona

No: C-11697

United States of America,

Plaintiff,

vs.

G. Clifford Smith,

Defendant.

MOTION TO DISMISS

Viol: 18 U.S.C. 287, False Claim Against Govern-  
ment

And now comes the defendant herein, and says that the indictment herein is not sufficient in law to require the defendant to plead thereto, and this defendant moves the Court to dismiss the indictment, and for special reasons shows unto the Court the following:

1. There has been no showing of a fraudulent intent on the part of the defendant. The facts as shown to date have indicated that a drawing account might be used by the Arizona School of Aeronautics, and/or its representatives pending the establishment of a permanent cost analysis.

Re: U. S. vs. Long  
14 Fed. Supp. 29.

2. The initiation of the aforesaid action was not instigated by the particular agency alleged to have been injured or upon which said demand was made.

Re: U. S. vs. White  
69 Fed. Supp. 562.

3. The prosecution to date, has failed to allege or show any wrongful purpose, in the presentation of the voucher set forth in the complaint.

Re: U. S. vs. Buckley  
49 Fed. Supp. 993.

4. The government has failed to join the corporation and/or its directors as necessary parties.

Calif. Derring's Penal Code 1937  
568, 571, 572.

5. The factual material submitted has not conclusively shown that the materials vouchered for were not on order or expected and routinely vouchered for in accord with the practices commonly employed by the agency involved.

U. S. vs. Route  
33 Federal 246.

U. S. vs. Stubbs  
6 Alaska, 736.

U. S. vs. Dimmick  
23 Sup. Ct. 850  
189 U. S. 509-47.

Respectfully submitted.

/s/ HAROLD C. WHEELER,  
Attorney for Defendant,  
111 W. Alameda,  
Tucson, Arizona.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 8, 1949.

In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF TUESDAY,  
FEBRUARY 14, 1950

Honorable Dave W. Ling, U. S. District Judge,  
Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss comes on regularly for hearing this day. K. Berry Peterson, Esquire, Assistant U. S. Attorney, is present for the government. Harold C. Wheeler, Esquire, appears on behalf of the defendant. Said motion is now duly argued, and

It Is Ordered that said motion to dismiss be and it is denied.

The defendant is present in person with his counsel, Harold C. Wheeler, Esquire. The defendant is now duly arraigned; the defendant waives reading of the indictment and a copy thereof is handed to him. The defendant's plea is not guilty, which plea is duly entered, and

It Is Ordered that this case be and it is set for trial April 10, 1950, at 10 o'clock a.m.



[Title of District Court and Cause.]

MOTION TO DISMISS

And now comes the defendant, G. Clifford Smith, and moves this Court to quash and dismiss the indictment filed in the above-entitled and numbered case for the following reason :

I. That said indictment is fatally defective on its face, in that it fails to follow the wording and contents of the statute, and further omits the allegations that defendant did, "knowingly and willfully" commit the act or acts alleged.

Wherefore, this defendant prays that said action be dismissed and defendant be discharged from custody and from the indictment herein.

/s/ HAROLD C. WHEELER,  
Attorney for Defendant.

Ref. 18 U.S.C. 287, Sec. 1001.

Garrett vs. U. S.,  
17 Fed. 2479.

Crowley vs. U. S.,  
194 U. S. 461.

Matter of substance and not of form.

[Endorsed]: Filed April 10, 1950.

In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF MONDAY,  
APRIL 10, 1950

Honorable Benjamin Harrison, U. S. District  
Judge, Specially Assigned, Presiding.

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, appears for the Government. The defendant, G. Clifford Smith, is present in person with his counsel, Harold Wheeler, Esquire. J. D. Ambrose is present as Court Reporter. Both sides announce ready for trial. On motion of Harold Wheeler, Esquire, It Is Ordered that Irving Kipnis, Esquire, be entered as associate counsel for the defendant.

Examination of jurors on voir dire is now had.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

And thereupon, at the hour of 2:50 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., April 11, 1950, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Counsel for defendant now urge Defendant's Motion to Dismiss now filed herein and Motion to Dismiss heretofore filed, and argue the same to the Court.

Whereupon, It Is Ordered that said motions be and they are denied.

In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF TUESDAY,  
APRIL 11, 1950

Honorable Benjamin Harrison, U. S. District  
Judge, Specially Assigned, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the defendant and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the Government waives opening statement to the jury and counsel for the defendant reserve statement.

Government's Case:

Cletus Robbeloth is now sworn and examined on behalf of the Government.

Government's exhibit one, Contract, is now admitted in evidence.

Stephen J. Klich is now sworn and examined on behalf of the Government.

Government's exhibit two, eleven invoices, is now admitted in evidence.

And thereupon, at the hour of 10:10 o'clock a.m., It Is Ordered that the further trial of this case be continued to the hour of 10:25 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at the hour of 10:25 o'clock a.m.,

the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's exhibits are now admitted in evidence:

3. Certified copy of check.
4. Certified copy of claim.
5. Certified copy of check.
6. Certified copy of claim.

The following Government's witnesses are now sworn and examined:

Wm. P. McConnell,  
Lewis W. Koldeway,  
Albert L. Thomale,  
Antonio V. Bustamante,  
Joaquin C. Urbano,  
Oscar M. Gomez,  
Charles R. Hunt,  
George E. Patterson,  
Fred W. Streicher.

Whereupon, the Government rests.

The defendant now moves to dismiss this action, and It Is Ordered that said motion be and it is denied.

The jury is now duly admonished by the Court and excused until 1:45 o'clock p.m.

Counsel for the defendant now renews motion to

dismiss, and It Is Ordered that said motion be and it is denied.

And thereupon, at the hour of 12 o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of 1:45 o'clock p.m., this date, to which time the defendant and counsel are excused.

Subsequently, at the hour of 1:45 o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case:

Cletus Robbeloth, heretofore sworn, is now called and examined on the defendant's behalf.

John Patrick Burke is now sworn and examined on behalf of the defendant.

Fred W. Streicher, heretofore sworn, is now called and examined on behalf of the defendant.

Emily Hammes is now sworn and examined on behalf of the defendant.

Charles V. Nevill is now sworn and examined on behalf of the defendant.

The defendant, G. Clifford Smith, is now sworn and examined in his own behalf.

Defendant's Exhibit A, 7 receipts, is now admitted in evidence.

And the defendant rests.

Both sides rest.

All the evidence being in, the case is argued by

respective counsel to the Jury. Whereupon, the Court duly instructs the Jury, and said Jury retire at the hour of 4:15 o'clock p.m. in charge of a sworn bailiff to consider of their verdict.

Subsequently, at 5:05 o'clock p.m., defendant and all counsel being present, the Jury return in a body into open Court and are further instructed by the Court. At 5:10 o'clock p.m., said Jury retire to further consider of their verdict.

Subsequently, the defendant and all counsel being present, the Jury return in a body into open Court at the hour of 5:40 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

UNITED STATES OF AMERICA,

Plaintiff,

Against

G. CLIFFORD SMITH,

Defendant.

VERDICT

No. C-11697 Tucson

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, to find the defendant, G. Clifford Smith, Guilty as charged in count one of the indictment; Guilty as charged in count two of the indictment.

H. H. MORGAN,

Foreman.

Said Jury recommends leniency.

The verdict is read as recorded, and no poll being desired by either side, the Jury is discharged from the further consideration of this case and excused until Wednesday, April 12, 1950, at the hour of 10:00 o'clock a.m.

And thereupon, It Is Ordered that this case be set for sentence Thursday, April 13, 1950, at the hour of 9:30 o'clock a.m. and referred to the Probation Officer for an investigative report, and that the defendant be allowed to remain on bond herein.

---

[Title of District Court and Cause.]

No. C-11697 Tucson

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, G. Clifford Smith, guilty as charged in count one of the indictment; guilty as charged in count two of the indictment.

/s/ H. H. MORGAN,  
Foreman.

[Endorsed]: Filed April 11, 1950.



In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF THURSDAY,  
APRIL 13, 1950

Honorable Benjamin Harrison, U. S. District Judge,  
Specially Assigned, Presiding.

[Title of Cause.]

This case comes on regularly for sentence this date. The defendant is present with his counsel, Harold Wheeler, Esquire, and is now advised by the Court of his right to make a statement in his own behalf and to present any information in mitigation of punishment. Thereupon, the Court finds that no legal cause appears why judgment should not be now imposed and renders judgment as follows:

No. 11697-Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. CLIFFORD SMITH,

Defendant.

On this 13th day of April, 1950, at Tucson, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of



guilty of the offense of violating Title 18, United States Code, Section 287, (False claim against Government) as charged in Counts One and Two of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of \$500.00 on said Count One; that the execution of Judgment on Count One be stayed for a period of 60 days and that if said fine is not paid within said 60 day period, the defendant shall be committed until said fine is paid or he is otherwise discharged by law.

It Is Further Adjudged that the imposition of sentence on Count Two be suspended and that the defendant be placed on probation for a period of three (3) years, on condition that during said period of probation the defendant shall not violate any law of the United States, State, County or City where he resides; that he report to the Probation Officer of this Court at such times and places as said Probation Officer may direct and that he shall not leave the State of Arizona without permission of the Probation Officer and that if he is permitted to leave the

state he shall keep in touch with the Probation Officer.

BEN HARRISON,

United States District Judge.

[Title of Cause.]

It Is Ordered that the bond of the defendant, G. Clifford Smith, be and it is exonerated herein.

—

In the District Court of the United States  
for the District of Arizona

No. 11697-Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. CLIFFORD SMITH,

Defendant.

### JUDGMENT

On this 13th day of April, 1950, at Tucson, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of guilty of the offense of violating Title 18, United States Code, Section 287, (False claim against Government) as charged in Counts One and Two of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of \$500.00 on said Count One; that the execution of judgment on Count One be stayed for a period of 60 days and that if said fine is not paid within said 60 day period, the defendant shall be committed until said fine is paid or he is otherwise discharged by law.

It Is Further Adjudged that the imposition of sentence on Count Two be suspended and that the defendant be placed on probation for a period of three (3) years, on condition that during said period of probation the defendant shall not violate any law of the United States, State, County or City where he resides; that he report to the Probation Officer of this Court at such times and places as said Probation Officer may direct and that he shall not leave the State of Arizona without permission of the Probation Officer and that if he is permitted to leave the state he shall keep in touch with the Probation Officer.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed and Docketed April 13, 1950.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellant:

G. CLIFFORD SMITH,  
2200 East Glenn,  
Tucson, Arizona.

Name and address of appellant's attorney:

IRVING KIPNIS,  
52 West Alameda,  
Tucson, Arizona.

Offense: Violating Title 18 U. S. Code, Section 287 (false claim against Government).

Concise statement of judgment: Judgment dated April 13, 1950:

It was adjudged that defendant is guilty as charged and convicted of the offense of violating Title 18, U. S. Code, Section 287.

It was adjudged that defendant pay a fine of Five Hundred and No/100 (\$500.00) Dollars on Count I. (Stay of Execution for sixty (60) days.)

It was further adjudged that enforcement of sentence on Count II be suspended (defendant placed on probation for three (3) years).

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 19th day of April, 1950.

/s/ G. CLIFFORD SMITH,  
Appellant.

[Endorsed]: Filed April 20, 1950.

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[Title of District Court and Cause.]

APPLICATION FOR STAY OF EXECUTION  
AND RELIEF PENDING REVIEW

Comes Now G. Clifford Smith, by his attorney, Irving Kipnis, and respectfully requests this Court for an order staying execution of that Judgment dated April 13, 1950, in the above-entitled and numbered action, pending appeal.

/s/ IRVING KIPNIS,  
Attorney for  
G. Clifford Smith.

This application is based upon the following:

Notice of Appeal filed April 20, 1950, pursuant to Rule 37, Rules of Criminal Procedure.

Rule 38, Rules of Criminal Procedure.

Rule 39, Subdivision B(1), Rules of Criminal Procedure.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1950.

In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF FRIDAY,  
APRIL 21, 1950

Honorable Howard C. Speakman, United States  
District Judge, Presiding.

[Title of Cause.]

It Is Ordered that the defendant herein post bond on appeal sufficient to cover the payment of fine and costs on appeal.

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In the District Court of the United States  
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF THURSDAY,  
APRIL 27, 1950

Honorable Howard C. Speakman, United States  
District Judge, Presiding.

[Title of Cause.]

It Is Ordered that the record show that the bond on appeal filed herein on April 21, 1950, has been rejected by the Court for the reason that it is not in compliance with the order of Court therefor entered on April 21, 1950.

It Is Ordered that the bond on appeal in the sum of \$750.00 with the United States Fidelity and

Guaranty Company as surety thereon now presented be and it is approved and filed as the bond on appeal herein for payment of fine and costs on appeal.

It Is Further Ordered that defendant's application for stay of execution and relief pending review, heretofore filed herein, be and it is granted.

It appearing to the Court that J. D. Ambrose, Official Court Reporter, U. S. District Court at Los Angeles, California, has requested the file herein be forwarded to him for use in connection with the preparation of the transcript of testimony herein, It Is Ordered that the file be transmitted to the Clerk of the U. S. District Court, Southern District of California, for the use of said court reporter.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men By These Presents:

That we, G. Clifford Smith, as Principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as Surety, do hereby acknowledge ourselves jointly and severally bound to United States of America, Appellee, for payment of the fine and all costs in above entitled suit, not to exceed, however, the sum of Seven Hundred and Fifty Dollars, (\$750.00).

Conditioned, However, that the said G. Clifford Smith, Appellant, shall pay the fine and all costs if the appeal is dismissed or the judgment affirmed or



all such costs as the Circuit Court of Appeals may award, up to the full penalty of this bond.

Witness our hands and seals this 20th day of April, A.D. 1950.

/s/ G. CLIFFORD SMITH,  
Principal.

UNITED STATES FIDELITY  
& GUARANTY COMPANY,

[Seal] By /s/ VIRGINIA BATEY,  
Its Attorney in Fact.

[Endorsed]: Filed April 27, 1950.

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[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF  
RECORD ON APPEAL

To the Clerk of the District Court:

The appellant herein respectfully requests that you prepare and properly certify, for use on appeal in the above-entitled matter, a transcript of the complete record, and all the proceedings, motions, minute entries, orders, reporter's transcript of all the evidence and proceedings, exhibits, and particularly the following, to wit:

1. Record of proceedings before Thomas A. McKay, U. S. Commissioner at Tucson, Commissioner's Docket No. 2, Case No. 594, including the Complaint, Warrant of arrest and temporary commitment of G. Clifford Smith.



2. Indictment.
3. All motions, including the Motion to Quash and the Motion to Dismiss.
4. All orders and minute entries.
5. Reporter's Transcript of evidence and proceedings.
6. Government's Exhibits Nos. 1, 2, 3, 4, 5 and 6.
7. Defendant's Exhibit "A".
8. The Judgment.

Dated this 23rd day of May, 1950.

/s/ IRVING KIPNIS,  
Attorney for G. Clifford  
Smith, Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 23, 1950.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
AND DOCKETING OF RECORD ON APPEAL

Pursuant to Rule 73(g), good cause appearing therefor, it is hereby Ordered that the time for filing and docketing of record on appeal in the above-entitled cause be extended to June 10, 1950.

Dated: May 26, 1950.

/s/ HOWARD C. SPEAKMAN,  
Judge, United States District Court, District of  
Arizona.

[Endorsed]: Filed May 26, 1950.

In the United States District Court,  
 District of Arizona  
 No. C-11697-Tucson

Honorable Ben Harrison, Judge Presiding.

UNITED STATES OF AMERICA,  
 Plaintiff,

vs.

G. CLIFFORD SMITH,  
 Defendant.

REPORTER'S TRANSCRIPT  
 OF PROCEEDINGS

Appearances:

For the Plaintiff:

FRANK FLYNN, ESQ.,  
 U. S. District Attorney, and  
 K. BERRY PETERSON,  
 Asst. U. S. District Attorney.

For the Defendant:

MESSRS. HAROLD C. WHEELER and  
 IRVING KIPNIS.

Tucson, Arizona, Monday, April 10, 1950, 2 P. M.

(A jury of 12 was duly impanelled and  
 sworn.)

The Court: The balance of the jurors are excused  
 until Wednesday morning at 9:30.

At this time, in the case of United States versus G. Clifford Smith, we are going to take a recess until 9:30 tomorrow morning and the court wishes to admonish you not to discuss this case among yourselves or permit any person to discuss it with you or express or form any opinion whatsoever until the case has been finally submitted to you.

I give this admonition each time realizing that jurors consider it as a formality but experience has taught me that jurors forget it sometimes and the first thing you know they will go out and ask questions about somebody or a certain school as in this case, or something else and the first thing you know they are in a discussion about the case.

I had one case where a juror went out with a real estate dealer to look over the property during the course of a trial involving that property. He made his own observations instead of waiting for the evidence. He did it perfectly innocently. It is easy to unconsciously and innocently discuss a case, particularly when it is being presented to you. I hope you will bear in mind this admonition and take it not as a formality but take it seriously in order that any [3\*] verdict that you may render here may be a just verdict and when you leave the courtroom you will feel that you have done your duty, whatever the verdict may be.

With that you are excused until tomorrow morning at 9:30.

Will counsel stipulate the admonition is sufficient

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\* Page numbering appearing at top of page of original Reporter's Transcript.

and need not be repeated at future intermissions?

Mr. Wheeler: Yes.

Mr. Flynn: Yes, your Honor.

The Court: Very well, you are excused until tomorrow morning at 9:30.

(Whereupon, the jury retires from the courtroom.)

The Court: Mr. Flynn, have you looked over counsel's motions?

Mr. Flynn: Yes, your Honor.

The Court: What have you to say?

Mr. Flynn: I don't have a copy of the new criminal rules on pleadings so I can't comment at this time.

The Court: We will take a few minutes recess.

(Short recess.)

The Court: Counsel, where is there anything in this statute that says it shall be knowingly, unlawfully and willfully done?

Mr. Wheeler: The original information, may it please the court, was filed under Title 18, Section 287, subsection [4] 1001.

The Court: But that section has been replaced and the indictment is brought under the new section.

The new section says that "whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined" and so forth.

There is nothing in the statute that says it must be knowingly and willfully committed.

Mr. Wheeler: The original information, may it please the court, was filed under Title 18, Section 287, Subsection 1001.

The Court: But that section has been replaced and the indictment is brought under the new section. The new section says that "whoever shall make or present to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined" and so forth, and it says in the indictment:

"Said defendant then and there knew the claim to be fraudulent." [5]

That is contained in the body of the indictment.

Mr. Wheeler: Yes, your Honor, I see that. My assumption was he was filing under Subsection 1001 and therein is set forth the necessity of it having been done willfully and knowingly.

Your Honor is possibly familiar with that section:

"Whoever in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up——"

The Court: I am familiar with the old section. I was reading it this afternoon to check with this to see the changes.

Mr. Wheeler: The changes have been a little too rapid for some of us to keep up with.

The Court: And as to the other motion.

Mr. Wheeler: There again the terminology, I imagine, should be corrected under the new rules. It should be a motion to dismiss. It used to be a motion to quash.

The Court: You are too late on a motion to quash.

Mr. Wheeler: Not at the time this was filed, your Honor. This motion has been in the court's hands for several months.

The Court: Hasn't the original motion ever been passed on?

Mr. Wheeler: No. [6]

The Court: The one filed November 8.

Mr. Wheeler: No, it has never been passed upon and I submitted today my authorities in support of it.

The Court: Counsel, I think those all have to do with questions of fact that may be developed under this indictment. I have read the cases cited in the motion. I realized you had raised some questions of law and I tried to familiarize myself with them.

For instance the first case you cite is United States versus Long, 14 Fed. Supp. 29. That is a case where a court gave an instructed verdict or judgment of acquittal after the evidence was in. Each one of those have to do with things that developed during the trial.

Mr. Wheeler: That is right.

The Court: And not with the wording of the

indictment. Now, I don't know what the proof is going to be in this case.

Mr. Wheeler: I will concede your attitude is well taken and possibly we jumped the gun in filing the motions.

The Court: I am glad you did because it makes it easier for me to pass on the admissibility of evidence and so forth.

Mr. Wheeler: Would the court consider taking this under advisement and ruling on it later?

The Court: Counsel, if they don't make a prima facie case it won't take long for me to rule on it.

Mr. Wheeler: Very well. [7]

The Court: I will, however, instruct the jury in substance as follows, if they show only that a claim was filed and the claim was false that that is not sufficient. They will have to show that when the defendant filed the claim he had to have knowledge of the falsity of it.

Mr. Wheeler: That was the point I was getting at.

The Court: Of course knowledge is something that the jury has a right to determine from all the circumstances in the case, but if you want to submit to me any proposed instructions along that line, not formula instructions, but instructions on the law of the case I will be glad to consider them.

Mr. Wheeler: Would the court then entertain an instruction concerning the relative value of motive in a situation of this sort in which fraud is alleged? I think it is one of the few cases in which motive and intent—



The Court: I will give an instruction on intent. I think the question of motive is a matter of argument.

I assume it will be your contention in that respect that the defendant signed these papers as an employee of the corporation but received no benefit from the false claim and it was of no advantage to him. That would be an argument against knowledge on his part of the falsity. That is the general principle that you have in mind?

Mr. Wheeler: Yes. [8]

The Court: May I ask counsel if there is any possibility of your going over any documentary evidence you intend to introduce so it may be admitted without argument?

Mr. Wheeler: You mean stipulated to? If we have an opportunity to see it I will be very happy to stipulate to its admission.

The Court: I wouldn't expect you to stipulate to it without seeing it.

Mr. Wheeler: But I have had no opportunity yet.

The Court: Very well. The motions submitted are denied. We will take a recess at this time until 9:30 o'clock tomorrow morning.

(Whereupon, at 3:15 o'clock p. m. a recess was had until 9:30 o'clock a.m., Tuesday, April 11, 1950.) [9]

Tucson, Arizona, Tuesday, April 11, 1950, 9:30 a.m.

The Court: Will you stipulate, gentlemen, the



jurors are all present and in the jury box and the defendant is present in court with his counsel?

Mr. Wheeler: So stipulated.

Mr. Flynn: Yes, your Honor.

The Court: Does counsel for the Government desire to make an opening statement?

Mr. Flynn: No, your Honor.

The Court: Does counsel for the defendant desire to make an opening statement?

Mr. Wheeler: We will reserve our opening statement.

The Court: The Government will call its first witness.

Mr. Peterson: Call Mr. Robbeloth.

### CLETUS F. ROBBELOTH

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Cletus F. Robbeloth.

### Direct Examination

By Mr. Peterson:

Q. What is your business or occupation, Mr. Robbeloth?

A. I am an employee of the Veterans Administration.

Q. In what capacity? [10]

A. Contract negotiator.

Q. How long have you been there?

A. In that position since July, 1947.

(Testimony of Cletus F. Robbeloth.)

Q. And as such did you negotiate the contract between the Arizona Institute of Aeronautics and the Veterans Administration? A. I did.

Q. Do you have a copy of that contract with you?

A. I have one copy of six, yes, sir.

Q. Do you know the defendant in this case, Clifford Smith? A. I do.

Q. Did he sign that contract?

A. Yes, sir; he signed all six copies.

Q. And you have the one that is retained by the Veterans Administration?

A. That is correct.

Q. Is that a part of the permanent files of the Veterans Administration? A. Yes, sir.

Q. And those are directly under your work and observation? A. That is correct.

Q. Will you produce the contract, please?

A. It is part of the file. Does the court wish me to [11] remove it?

Q. Yes, will you take it out of the file so we can have that separate? A. Yes, sir.

Q. Is that attached to something?

A. It is loose now.

Q. Will you look over those several sheets of the contract and state whether or not that is the contract which was made with the Arizona Institute of Aeronautics? A. It is.

Mr. Peterson: We offer this in evidence, your Honor. ....

Mr. Wheeler: No objection.

(Testimony of Cletus F. Robbeloth.)

The Court: It will be admitted as Government's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Peterson): Will you tell me whether or not that contract defined goods to be supplied the students at that school?

A. Yes, this contract——

The Court: Just a moment. Just indicate the part of the contract that indicates that.

Mr. Peterson: It is all a part of the contract, your Honor.

The Court: But point out the particular part. When you [12] ask him if the contract requires certain things you are calling for a conclusion of the witness. The contract is the best evidence. I think the particular portion should be pointed out and should be read to the jury.

The Witness: Shall I proceed?

The Court: Yes.

The Witness: Exhibit C, D and E to the contract list tools which were to be furnished by the school to the veterans in training.

Exhibit C covers the tools to be furnished for a veteran in the air craft mechanic's course and/or the aircraft and engine combined course.

Exhibit D is a list of the tools which would be furnished only to those in the engine-mechanics course.

(Testimony of Cletus F. Robbeloth.)

One list approximately totaled \$100.00 and the second and smaller list totaled approximately \$75.00.

Q. (By Mr. Peterson): Do you know whether or not the school operated afterwards on that contract?

A. This contract was in effect until July 30th, 1949.

Q. What was the date of the contract—when was it executed?

A. It was executed originally under a memorandum agreement dated January 31, 1949, and the formal contract was completed the 28th of February, 1949.

Mr. Peterson: Cross examine. [13]

#### Cross-Examination

By Mr. Wheeler:

Q. Cletus, ordinarily there is a provision that the school must be in operation for a year before a contract, a firm contract can be signed, is that not true, with the Veterans Administration?

A. No; that is not a Veteran Administration regulation.

The State of Arizona is the approving agency for schools offering training to veterans. They had a regulation that a school must be in existence at least six months before it could apply for permission to train veterans.

Q. And this was a new school, was it not, Mr. Robbeloth?

(Testimony of Cletus F. Robbeloth.)

A. At the time they began negotiations with the Veterans Administration they were not in existence six months.

Q. Do you of your own knowledge know whether or not this contract had been let more or less on a cost-plus basis?

A. The contract is for furnishing training to veterans and was based on an estimated cost as was done with schools which did not have operating experience.

This school did not have, therefore—the contract was negotiated on an estimated cost basis for tuition.

Q. And the money for tuition could have been vouchered for at any time, could it, Mr. Robbeloth?

A. The money for tuition could be vouchered for in accordance with the terms of the contract after the services [14] were rendered.

Q. Would you tell us what those terms of the contract are?

A. If I may refer to the contract.

Q. With respect to that.

A. The contractor will prepare and certify vouchers for tuition fees and other services at the end—I am leaving out some of this which is not pertinent—at the end of each calendar month for tuition. Any time for books, supplies and equipment after they are furnished or re-issued.

Q. Now, this so-called contractor was the Arizona Institute of Aeronautics, was it not, Mr. Robbeloth?

A. That is correct.

(Testimony of Cletus F. Robbeloth.)

Q. And the vouchers that you received—do you recall them?

A. The vouchers do not come directly to me.

Q. You of your own knowledge would not know then whether or not any direct payments had been made to G. Clifford Smith at any time?

A. I know that vouchers in the name of G. Clifford Smith would not be paid by the Veterans Administration.

Q. In other words, any vouchers to be paid would have to be submitted in the name of the Arizona Institute of Aeronautics—the party with whom you were dealing, is that correct? [15]

A. That is correct.

Q. By any one of their officers—their duly authorized officers?

A. Yes, sir; the person certifying he is authorized to submit a voucher in the name of the corporation.

The Court: May I ask who signed the contract?

The Witness: G. Clifford Smith, director.

The Court: On behalf of the corporation?

The Witness: Yes, sir.

Q. (By Mr. Wheeler): Now, directing your attention, Mr. Robbeloth, to the initial or early days of this school, do you recall any vouchers signed by any other officer of the corporation?

Mr. Peterson: Just a moment. We insist that that should be confined to a time not later than March 18, the date of the charges in this indictment. There might have been other vouchers filed



(Testimony of Cletus F. Robbeloth.)

after all these proceeds took place, but I think the question should be confined to that time.

The Court: I think the objection is good. I think you are wandering away from the subject matter.

The question before this jury is whether or not the defendant Smith knowingly filed a false claim with the Veterans Administration, an agency of the United States Government.

Mr. Wheeler: It is our contention, if your Honor please, that the corporation should be the defendant in this matter.

The Court: Well, counsel, you can't send a corporation to jail; you can an individual. The individual is the one who filed the voucher and the one who committed the act. The corporation itself does not file a false claim. It is the individual who signs on behalf of the corporation.

Mr. Wheeler: I don't want to appear contentious, your Honor,—

The Court: I am just telling you what to confine yourself to.

Mr. Wheeler: Very well. Then the objection to the question as to whether any prior vouchers had been signed—

The Court: We are only interested in these vouchers, counsel.

Q. (By Mr. Wheeler): Now, your organization has a direct relief and direct action in case of overpayment or questionable vouchers, does it not, Mr. Robbeloth?

(Testimony of Cletus F. Robbeloth.)

The Court: That is immaterial. This is a criminal charge.

Q. (By Mr. Wheeler): Do you have a copy of Regulation 10539, Rules and Procedure Manual, M7-5 with you, Mr. Robbeloth?

A. Yes. That is actually two different sets of regulations, but I have the 10539 which is known as Regulations and Procedure. It is not a part of M7-5.

Q. Now, directing your attention to Section F of those regulations, is there not a provision there for billing for [17] supplies and tuition?

A. Not tuition under this section.

Q. Section B and Section F?

A. The Section is entitled "Books, Supplies and Equipment Including Tools."

Q. And what is the provision therein for billing for those, Mr. Robbeloth?

A. Well, its is approximately 10 pages long. I could read it all.

Q. Well, with the permission of the court, to clarify the matter, is there a provision therein to bill at irregular intervals?

A. There are provisions to bill at irregular intervals for supplies which are furnished.

The Court: May I ask a question? Is there a provision for the billing of tools before they are actually furnished?

The Witness: No, sir.

Q. (By Mr. Wheeler): Is there a provision therein that tools and books on order or which have



(Testimony of Cletus F. Robbeloth.)

not been issued, Mr. Robbeloth, are considered to be furnished?

A. Not to my knowledge.

Q. In other words then at this time or at the time these vouchers were signed although those tools had been ordered —

Mr. Peterson: We object to that. There is no showing that they had been ordered.

Mr. Wheeler: Of course the Government hasn't put on its case yet, your Honor.

Mr. Peterson: You can't ask that question until you have some proof in here that they had been ordered.

The Court: We can go back to the indictment. I don't know what is in those vouchers. I haven't seen them, but the defendant is charged with certifying to certain facts. Now the question is were those facts he certified to knowingly false. That is the real issue.

Q. (By Mr. Wheeler): These regulations which you have there, Mr. Robbeloth, do they serve to control a contract which was entered into with the Arizona Institute of Aeronautics?

A. Yes, sir.

Q. On these schools which had not been in operation—which were operating on an estimated cost-plus basis, which you term the Arizona Institute of Aeronautics. Is there a provision therein for them to estimate the supplies and cost of supplies?

A. The supplies were estimated in the maximum amount in the contract.

(Testimony of Cletus F. Robbeloth.)

Q. You are referring now to the contract and not to the regulations, is that correct?

A. The regulations provide for it also.

Q. The regulations provide for it also? [19]

A. Yes, sir.

Q. In other words, there is provision in the regulations whereby a contractor may estimate the cost of books and supplies and voucher for them?

A. No. The regulation provides that there will be set forth in the contract the actual or estimated cost of the supplies.

Q. And am I correct in your earlier statement in stating that those supplies may be vouchered for at any time during the student's time in school and the tuition itself at the end of the services furnished?

A. Would you please repeat the question?

(Question read.)

The Witness: I believe there is a complexity of thought there between supplies and tuition. Supplies cannot be paid for before they are furnished to the veteran.

Q. (By Mr. Wheeler): Did your organization ever have an audit made of the school, Mr. Robbeloth? A. Yes, we have.

Q. Do you know what comparative analysis there is between the estimated cost as originally furnished by the Arizona Institute of Aeronautics and the actual payment by the Government in the overall picture?

Mr. Peterson: I think that question is inma-

(Testimony of Cletus F. Robbeloth.)

terial, your Honor. It doesn't have anything to do with this charge.

The Court: Objection sustained.

Q. By Mr. Wheeler: You people retained the power at any time, did you not, Mr. Robbeloth, to inspect and supervise these schools?

A. Yes, sir.

Q. And suspend their operations?

A. We did not retain the power to suspend their operations. That is a State right and governed by the Governor's council for veteran training, but they act on the basis of information supplied by us or which they have ascertained in another manner.

Mr. Wheeler: Will counsel stipulate to the introduction of the rules and regulations into the record at this time?

The Court: The court will not permit the introduction of them. We are trying a false claim case.

Mr. Wheeler: Very well, your Honor. That is all at this time. It may be that I will want to recall this witness again.

The Court: Very well. Call your next witness.

Mr. Peterson: Mr. Clich.

## STEPHEN J. CLICH

called as a witness by the plaintiff, being first sworn, was examined and testified as follows: [21]

## Direct Examination

By Mr. Peterson:

Q. Will you state your name?

A. Stephen J. Clich.

Q. What is your business, Mr. Clich?

A. Credit Manager for Sears Roebuck and Co.

Q. How long have you been there in that position?

A. I was transferred to my present position on June 4 of this last year.

Q. Were you in the position of credit manager during the month of March, 1949?

A. No, sir. I was not here at that time.

Q. Well, were you employed with Sears at that time? A. Yes, sir, I was.

Q. Were you familiar with the orders that were made by the Arizona Institute of Aeronautics?

A. I think I am familiar with the account. I was familiar with it at the time I received the account.

Q. Well, do you know whether you were or not?

A. Sir?

Q. Do you know whether or not you were familiar with the account at that time?

A. Well, it was brought—

The Court: Don't the records speak for themselves, counsel? [22]

Mr. Peterson: Well, I have some documents

(Testimony of Stephen J. Clich.)

here which I want to ask him about and in order to ask him about them I thought I had to lay a foundation.

The Court: If he has the records of the company and he is the custodian of them he may testify regarding them.

Mr. Peterson: It isn't a record of the company. It is a part of the records of the Arizona Institute of Aeronautics which were made by the Sears Roebuck Co. and delivered to them at the time of the delivery of the goods.

The Court: Proceed.

The Witness: Will you repeat the question?

Q. (By Mr. Peterson): Were you familiar with the transactions for the purchase of supplies by the Arizona Institute of Aeronautics in the early part of 1949?

A. At the time I was transferred here it was brought to my attention and I had to pick it up at that time.

Q. When did you come here? A. June 4.

Q. 1949? A. Yes, sir.

A. And do you now have custody of the records of the Sears Roebuck Co.? A. Yes, sir.

Q. Mr. Clich, I will hand you a series of documents, nine of them, attached together and ask you if [23] those are copies of the records of the purchases made by the Arizona School of Aeronautics as shown by the books of the Sears Roebuck Co.?

A. May I compare them with my records?

The Court: Certainly.

(Testimony of Stephen J. Clich.)

Q. (By Mr. Peterson): Have you compared them recently? Did you compare them recently?

A. Yes, sir, I have.

Q. Well, you may compare them again.

A. Juror: Your Honor, I have good ears but it is pretty hard to hear Mr. Peterson.

Mr. Peterson: I am sorry my voice is not stronger but I haven't been very well. I will attempt to speak more directly this way.

The Court: It doesn't do any good to ask a question if the jury doesn't hear it.

The Witness: I find these records that have been presented to me to be exactly as I have them on my accounts, sir.

Mr. Wheeler: May I ask a question on voir dire, your Honor?      The Court: Yes.

#### Voir Dire Examination

By Mr. Wheeler:

A. Are these all the records you have, Mr. Clich. I am referring to records relative to the transactions [24] with the Arizona Institute of Aeronautics.

A. There were other records, sir, pertaining to orders at the time I had the account but they were all cancelled off of the account. These are the orders that were delivered to the customer.

Q. You are not familiar with the original orders or by whom they were ordered?

A. They were all ordered by the Arizona Insti-

(Testimony of Stephen J. Clich.)

tute of Aeronautics. I could not tell you the party who ordered them.

Q. Do you have any orders prior to February 24? I think that is the date on the first bill here.

A. There were two orders, one on February 12 and one on February 17, sir.

Q. Then this record does not comprise the entire record of Sears Roebuck and Co. as far as the Arizona Institute of Aeronautics is concerned?

A. That is their record, sir. My record shows two other orders.

Mr. Wheeler: We object to a partial introduction of the documentary evidence, your Honor.

Mr. Peterson: I haven't offered it yet.

Mr. Wheeler: I presume that is the purpose of it.

The Court: What is that?

Mr. Peterson: I haven't offered it yet.

Mr. Wheeler: Very well, we will withdraw our objection [25] then.

The Court: They should be marked for identification, counsel.

Mr. Peterson: Yes. Will you mark these, Mr. Clerk?

The Clerk: Government's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: Counsel asked you about two orders prior to the date you mentioned. What does your record show as to those orders?



(Testimony of Stephen J. Clich.)

The Witness: Sir, it shows a record or a sale on February 12 in the amount of \$68.43 and on February 17 of \$86.35.

Direct Examination  
(Continued)

By Mr. Peterson:

Q. Is that contained in these documents?

A. It should be there, sir. That is their record. I do not have anything to do with it.

The Court: What do you mean by "their records"?

The Witness: Well, sir, they received that copy. That is the customer's copy which they received at the time the merchandise was delivered. I have no control over that.

The Court: You have copies or the originals of those?

The Witness: I have my copies, sir.

The Court: Of the 17th and 22nd?

The Witness: Yes, sir. [26]

The Court: Why not produce those?

Mr. Peterson: No objection.

The Court: They are the originals. The witness is in court and under my direction. We will make this record complete so you will have them all in evidence.

Mr. Wheeler: Very well, your Honor.

The Court: You have no objection to the fact that these are carbon copies and this witness retaining the originals?



(Testimony of Stephen J. Clich.)

Mr. Wheeler: No, your Honor.

The Court: Then they may be made a part of the last exhibit for identification.

Mr. Peterson: Yes.

The Court: Will you hand them to the clerk?

Those additions complete the transactions of actual deliveries, is that right?

The Witness: That is right.

The Court: Let them be marked together with the last exhibit. You may proceed. Any further questions?

Q. (By Mr. Peterson:) That is all of the records which you have showing supplies furnished to the Arizona Institute of Aeronautics before March 18, 1949?

A. As I explained before, sir, there were a number of other orders which were cancelled out and which the Arizona Institute of Aeronautics did not receive and these records that I have are only on the merchandise that they received [27] from our company.

Q. And that was before March 18, 1949?

A. That is right, sir.

The Court: This says March 25, does it not?

Mr. Peterson: It covers it anyhow.

The Court: Yes.

Mr. Peterson: We offer the document in evidence at this time.

The Court: It will be admitted. Is there any objection?

Mr. Wheeler: No objection.

The Clerk: Government's Exhibit 2 in evidence.

(Testimony of Stephen J. Clich.)

(The document referred to was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Peterson: That is all.

The Court: You may cross examine.

### Cross-Examination

By Mr. Wheeler:

Q. Do the cancellations there show by whom they were made, Mr. Clich?

A. The orders, sir?

Q. Yes, the orders that were cancelled?

A. I do not have those orders, sir, inasmuch as they are part of our——

Q. Would the orders proper have the signatures of [28] the individuals by whom they were ordered, representing the corporation, or would you know that detail?

A. My orders show, sir, that the orders were submitted by the Arizona Institute of Aeronautics and the authorized agent was Mr. G. Clifford Smith.

Q. Throughout this period of time?

A. Yes, sir.

Q. And by whom were they cancelled? Does that show the orders that were not delivered?

A. They were ordered cancelled by my auditors, sir.

Q. You don't know by whose authority prior to that?

A. No, sir.

(Testimony of Stephen J. Clich.)

Mr. Wheeler: That is all at this time, your Honor.

The Court: May this witness be excused?

Mr. Wheeler: I think with Mr. Clich's permission we can give him 15 minutes or a half hour notice and I will ask that he be subject to recall later on, your Honor, if that is agreeable?

The Court: You are located right here in Tucson? The Witness: Yes, sir.

The Court: And if you get a telephone call you will respond immediately?

The Witness: Yes, sir.

The Court: Then you may be excused until notified to appear. [29]

Call your next witness.

Mr. Peterson: Your Honor, I have some exhibits which just came out of Washington and I haven't had an opportunity to look at them and neither has Mr. Flynn. They were supposed to have been here at least two days.

May we have a short recess so I can look them over and show them to counsel?

The Court: They are certified copies?

Mr. Peterson: Yes. I haven't looked them over myself to see what condition they are in.

The Court: How long a recess do you want?

Mr. Peterson: About 15 minutes. I would like to have Mr. Flynn look at them also.

The Court: Very well. Ladies and gentlemen, you have heard the reason for the intermission. We will take a recess of 15 minutes at this time and you

will bear in mind the admonition the court has heretofore given.

(Whereupon a short recess was had.)

The Court: Will you stipulate, gentlemen, the jurors are present and in the jury box and the defendant is in court with his counsel?

Mr. Wheeler: So Stipulated.

Mr. Peterson: Yes, your Honor.

The Court: You may proceed.

Mr. Peterson: May I have these [30] documents marked for identification, please?

The Clerk: Government's Exhibits 3 and 4 for identification.

(The documents referred to were marked Plaintiff's Exhibits 3 and 4 for identification.)

Mr. Peterson: May I also have these two documents marked for identification?

The Clerk: Plaintiff's Exhibits 4 and 5—Plaintiff's Exhibits 5 and 6 marked for identification.

Mr. Peterson: Your Honor, at this time I have shown Mr. Wheeler and counsel for the defense Government's Exhibits 3 and 4 and 5 and 6. They are certified copies of the record.

The Court: Any objection to their admission?

Mr. Wheeler: No objection, your Honor.

The Court: Do you have objection to any of them?

Mr. Wheeler: They may all go in.

The Court: They will be admitted.

(The documents referred to were marked Plaintiff's Exhibits 3, 4, 5 and 6 and received in evidence.)

The Court: I think a statement should be made as to what they are.

Mr. Peterson: I might state they are copies of the records.

The Court: What records? Are they records pertaining to this case, so the jury will know what we are talking about? [31]

Mr. Peterson: I want to show them to the jury and I will explain to them now what they are.

Exhibit 4 is a certified copy of the claim filed on the 18th day of March, 1949, by the Arizona Institute of Aeronautics and signed by G. Clifford Smith, the defendant in this case.

Mr. Wheeler: Will counsel state the amount?

Mr. Peterson: It is for \$700 plus \$70 allowed by the Government for handling charges and less a discount of 2 per cent, making the total payment \$754.60.

The Court: Pass that exhibit to the jury, please.

Mr. Peterson: That is Exhibit 4.

Exhibit 3 is the check paid by the Treasurer of the United States on March 31, 1949 in the amount of \$754.60 and endorsed by G. C. Smith.

Exhibit 6 is a claim filed by G. Clifford Smith in the amount of \$300 plus \$30, 10 per cent for original handling, less a discount of 2 per cent, making a total payment of \$332.40.

The Court: Was that filed by the school or by Mr. Smith?

Mr. Peterson: It is signed by the Arizona Institute of Aeronautics by G. Clifford Smith, director.

A check was sent on April 21st—I don't think this is particularly material, but it was sent to the Arizona Institute of Aeronautics endorsed by another director whose name I am unable to make out on this document. [32]

The Court: You will pass those to the jury.

Mr. Peterson: Yes.

The Court: You may proceed.

Mr. Peterson: Mr. McConnell, will you take the stand.

WILLIAM P. McCONNELL,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Peterson:

Q. Will you state your full name?

A. William P. McConnell.

Q. And what is your business, Mr. McConnell?

A. I am chief instructor of the Arizona Institute of Aeronautics.

Q. When did you first accept that position?

A. The latter part of October, 1948.

Q. And you have been continually with the school from that time on?           A. Yes, sir.

Q. Are you familiar with the list of tools which were to be supplied to the students at this school?

(Testimony of William P. McConnell.)

A. Yes, sir.

Q. Who made up that list?

A. The list was a copy of a similar list I had used in Philadelphia in a similar school and [33] I thought it would be—they had been already used with success and I just used the same list for this school.

Q. Do you know what the value of those tools was?

A. They were listed at \$75.00 for a complete set.

Q. Those were the tools to be delivered to each student?

A. That is right.

Q. Did you know the value of the books which were to be delivered to each student?

A. The amount of books that were to be delivered to each student was listed at just under \$25.00. I forget the exact amount.

Q. Were you employed there during March of 1949?

A. Yes, sir.

Q. Were you present when Sears Roebuck and Co. furnished 45 kits of tools to the students at the Arizona Institute of Aeronautics?

A. So much time has elapsed since that time that I have——

Q. You may recall making a statement on the 19th day of May, 1949?

A. Yes, sir. I have a copy of it.

Q. May I hand this to you and refresh your memory from it and ask you if that is your signature on that document?



(Testimony of William P. McConnell.)

A. Furnished 45 kits of tools, each kit valued at [34] \$58.85. Yes, sir, that is true.

Q. Do you know whether or not those students ever received the balance of those tools up to the amount of \$75.00? A. Yes, sir, they did.

Q. Was that before or after this defendant left?

A. That was after.

Q. He was no longer in charge as a director out there? A. That is right, sir.

Q. When these tools were furnished?

A. Yes, sir.

Q. In March, 1949?

The Court: When was the balance furnished?

The Witness: It was along in the latter part of April, 1949, sir.

The Court: That was after the complaints had come in?

The Witness: The exact date could be obtained from the Arizona Welding Company who furnished the balance of the tools. I think Mr. Moore has those.

Q. (By Mr. Peterson): Those were the last tools that were furnished? A. Yes, sir.

Q. And that was after, you stated, that this defendant had left? A. Yes, sir. [35]

Mr. Peterson: Cross examine.

### Cross-Examination

By Mr. Wheeler:

Q. Mack, by whom were these last tools ordered, do you recall?



(Testimony of William P. McConnell.)

A. They were ordered by the then president of the corporation, if my memory is correct, Mr. John Wiley.

Q. Mr. John Wiley?           A. Yes, sir.

Q. And do you know when he ordered them?

A. That I couldn't say. I couldn't give the exact date. It was the latter part of April if I remember correctly. However, the school records should show exactly when they were ordered. I didn't order them.

Q. You didn't order them yourself?

A. No, sir.

Q. Now this first 45 sets—kits of tools amounting to approximately \$60.00—\$58.85, they had been ordered by Smith when he was in there as a director, is that right?           A. That is right.

Q. Who had control of the issuance of those tools, Mack?

A. The issuance of the tools was entrusted to the then vice-president of the corporation, Mr. Fred Streicher.

Q. Fred Streicher?           A. Yes, sir. [36]

Q. And do you know whether Fred Streicher issued all of the tools that came in or not, to your own knowledge?

A. As far as I know he issued all the tools that came in at that time—not all of the tools, but the \$58.85 worth of tools.

Q. Did he keep those tools locked up before issuance?

A. They were locked in his office at night.

(Testimony of William P. McConnell.)

Q. They were locked in his office at night?

A. That is right.

Q. Smith had no control over the tools?

A. Well, the duty as I said of issuing the tools was with Mr. Streicher. He was given that duty.

Q. And did Mr. Streicher also have control of the issuance of the books?      A. Yes, sir.

Q. Do you recall, Mr. McConnell, when this case was under investigation that the post office at that time had some books ready for delivery and had notified your company?

A. No, sir, I do not.

Q. You don't recall that?      A. No, sir.

Q. Tools were pretty difficult to obtain during that period of time, were they not?

The Court: What was the question? [37]

Q. (By Mr. Wheeler): Tools were pretty difficult to obtain during that time?

The Court: In March, 1949?

Mr. Wheeler: Yes, your Honor, specialized tools.

Mr. Peterson: I object to that.

The Court: If this witness knows he may answer the question. I think most of us know by common knowledge that tools were not hard to obtain at that time. Did you have trouble getting tools?

The Witness: When we ordered from Arizona Welding we were able to get the tools in a short time.

Q. (By Mr. Wheeler): That was Arizona Welding?      A. Yes, sir.

The Court: When you discovered there was a

(Testimony of William P. McConnell.)

shortage in the delivery of tools you didn't have trouble getting the necessary tools to make up the difference, did you?      The Witness: No, sir.

Q. (By Mr. Wheeler): Do you know from whom they were ordered, Mack?

A. They were ordered from the Arizona Welding, which is a Tucson corporation. They were ordered through their salesman. I disremember his name.

Q. You don't know whether they had them in stock or whether they had to send off for them or anything of that sort? [38]

A. No, I do not. The headquarters of the company is at Phoenix and they were brought down from Phoenix.

Q. Pardon me?

A. I understood they were brought right down from Phoenix.

Q. In other words, they had to get them out of Phoenix?

A. That is right. That is my understanding, sir, of where they came from.

Q. The original orders went through Sears Roebuck, didn't they, Mack?

A. The order for the original tools?

Q. Yes.

A. Went through Sears Roebuck and Co., yes.

Q. Do you know by whom those orders were cancelled?      A. I do not.

Q. You don't know who cancelled those orders?

A. No, sir.

(Testimony of William P. McConnell.)

Q. Do you know for what reason?

A. No sir, I do not. Any knowledge I have on that would be hearsay and I don't wish to state it.

The Court: Did you have a purchasing agent out there?

The Witness: At that time the purchasing of equipment was done mostly by Mr. Smith.

Mr. Wheeler: Are you through, your Honor?

The Court: Yes. [39]

Q. (By Mr. Wheeler): You say mostly by Mr. Smith, Mr. McConnell. By whom else was the purchasing done?

A. On large items it was all done by Mr. Smith. On small items, say for instance I needed some little equipment or say the girls needed some stamps or something like that they got them themselves.

Q. You got them yourself? A. Yes, sir.

Q. Did Mr. Streicher purchase any large equipment? A. Prior to March 18?

Q. Yes. A. Yes, sir.

Q. And he vouched for it, did he not, Mr. Mack?

A. No, sir, not that I know of. I mean ——— what I am getting at is prior to March 18 while the school was being organized, both Mr. Streicher and myself made several trips up through Northern Arizona obtaining aeronautical equipment. We bought that equipment but it was okayed when we returned by Mr. Smith.

Q. You bought it in the name of the Institute, did you?

(Testimony of William P. McConnell.)

A. The corporation, but it was subject to Mr. Smith's okay.

Q. Now, diverting your attention again to this first kit of tools—you spoke of these [40] 45 kits. I believe you stated Mr. Streicher was in charge of the issuance of those tools?

A. That is right, sir.

Q. Do you know whether he obtained any type of receipt from the students when he issued those tools?

A. Yes, sir; a receipt was signed.

Q. A receipt was signed by each student, was it, Mr. McConnell?

A. That is my understanding, yes, sir.

Q. And to whom then did he turn those receipts over to, Mack?

A. That I do not know.

Q. In other words, Smith himself had no control over the issuance of the tools. That is what I am driving at. Do you follow what I am driving at? Did Smith actually get out and put those tools out to the students or were they put out through a third party or parties, namely Fred Streicher or yourself, Mack?

A. The tools were actually, as I say, issued by Mr. Streicher. However, Mr. Smith was familiar with the contents of the tool boxes I feel sure.

Q. And then the receipts from the students were given back to Mr. Smith for vouchering, is that correct?

A. I do not know. I don't know where they went.

(Testimony of William P. McConnell.)

Q. And of course you know nothing about [41] the internal frictions or workings or anything else of the corporation at that time, Mack?

A. Very little, sir.

Q. Were the officers of the institute all in harmony and did each one know what was happening?

Mr. Peterson: We object to that. This witness can't answer that question.

The Court: The objection is sustained.

Mr. Wheeler: I believe that is all at this time, your Honor.

The Court: Any further questions of this witness? Mr. Peterson: No.

Mr. Wheeler: Just one other question if we may.

Q. (By Mr. Wheeler): Were you at any time present when an order was put through Sears and Roebuck, Mack, for \$75.00 worth of tools?

A. Was I present when the order was put in at Sears and Roebuck?

Q. Yes. A. No, sir.

Q. Don't you recall being present with Smith at Sears Roebuck when the order was put through?

A. No, sir.

Mr. Wheeler: That is all at this time, I believe.

Mr. Peterson: That is all. [42]

The Court: Call your next witness.

Mr. Peterson: Call Mr. Lewis Koldewey.



LEWIS W. KOLDEWEY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Lewis W. Koldewey.

Q. What is your business, Mr. Koldewey?

A. I am a special agent of the Federal Bureau of Investigation.

Q. And what particular class of work do you do?

A. General criminal investigation.

Q. Auditing also?

A. Some if it appears on an investigative case.

Q. Did you make an investigation into the charges against this defendant on or about May 19 of 1949?

A. That is right, I did.

Q. Did you investigate some of the students who were out there at that time?

A. Well, I interviewed those boys, yes. That was the extent of my investigation.

Mr. Peterson: I would like to ask that these documents be marked separately for identification.

The Court: What are they, may I ask?

Mr. Peterson: They are statements made before Mr. Koldewey as a member of the Department of Justice, by the boys, stating the tools which they did not receive.

The Court: Students?



(Testimony of Lewis W. Koldewey.)

Mr. Peterson: Yes, tools they had not received up to as late as May, 1949.

The Court: Statements made by the students to this witness?

Mr. Peterson: Yes.

The Court: They would not be admissible.

Mr. Peterson: Well, I have these students here whom I will put on later.

The Court: You may put the students on but I don't think the statements made to this witness are binding upon this defendant.

Mr. Peterson: I merely want to identify them at this time.

The Court: You may have them marked for identification. There is no objection to that.

The Clerk: Marked separately, Mr. Peterson?

Mr. Peterson: Yes, separately.

The Clerk: Marked Government's Exhibits 7, 8, 9, 10, 11, and 12 for identification.

(The documents referred to were marked Plaintiff's Exhibits 7, 8, 9, 10, 11, and 12 for identification.) [44]

Q. (By Mr. Peterson): Did you make any investigation as to the cost of the tools actually distributed to either or any of those students at that time? A. Yes, I did.

Q. How did you arrive at the value of those tools?

A. I had the school's copy of the contract and this contract had as a supplement a listing of what

(Testimony of Lewis W. Koldewey.)

every student was to have in the way of books and tools.

Each tool was listed separately and had an estimated cost; and the same way with the books for the course pursued by each student.

Then I interviewed each one of these students who had been listed on this voucher.

Q. Let us not refer to the voucher.

A. And found from them——

The Court: Just a moment. That is a conclusion on your part. Why don't you ask him what you are driving at, counsel?

Q. (By Mr. Peterson): Did you make any investigation as to the cost of the tools actually given to the students whom you interviewed at the school?

A. Yes, sir.

Q. And what was the cost per student?

A. Approximately \$58.58.

Q. Did you make any investigation as to [45] the cost of the books which had actually been distributed?

A. Yes, sir, I did.

Q. You know the defendant here, don't you?

A. I do.

Q. Did you have any conversation with him along in May of 1949?

A. I did, yes. I interviewed him.

Q. Where did the conversation take place?

A. At the Pima County Jail.

Q. And who were present?

A. Merely he and I.

Q. What time of the day was it?

(Testimony of Lewis W. Koldewey.)

A. It was from a little before 3:00 in the afternoon to about 3:15 in the afternoon of May 25, 1949.

Q. Did you have any conversation relative to the vouchers which he had filed?

A. I did.

Q. What did he state?

A. He stated that this was a voucher which he had submitted and we asked whether or not he had signed it. He stated he had signed it. We asked regarding the amount of books and tools furnished each student. The defendant, G. Clifford Smith, stated he knew approximately \$50.00 worth of tools and books had been furnished each student at the time he had vouchered for the amount. [46]

Q. I will hand you Government's Exhibit 4 and ask you if you ever saw that document or a copy of it?

A. Yes; I saw the signed copy which had been given me to investigate.

Q. When you had that conversation was that the voucher you were asking him about?

A. That is right, that is the voucher which I had.

The Court: Did you show him only the one voucher?

The Witness: That is right. I merely showed him one voucher.

Mr. Peterson: Cross-examine.

(Testimony of Lewis W. Koldewey.)

Cross-Examination

By Mr. Wheeler:

Q. Mr. Koldewey, did you check back through the vouchers to determine what the Arizona School of Aeronautics or Institute of Aeronautics, had vouchered for since the beginning?

A. I did not.

Q. And you of your own knowledge don't know whether there were any prior vouchers submitted or not, do you, nor by whom?      A. I do not.

Q. Did you have specific instructions to restrict your investigation to a certain specific period of the school's operation or not?

A. I was given this voucher and was requested to [47] investigate the voucher which I had received.

Q. That is this voucher 4——

A. March 18 voucher.

Q. March 18 voucher?      A. Yes, sir.

Q. The one signed by Mr. Smith as director of the Arizona Institute of Aeronautics and counter-signed by H. K. Thomas, is that correct, or H. R. Thomas?      A. Yes, sir.

Q. This is the one to which you refer?

A. Yes, sir, March 18, that is right.

Q. And during this conversation that was alluded to were you told by Mr. Smith that the balance of the tools would be in and issued?

A. I was not.

(Testimony of Lewis W. Koldewey.)

Q. Are you quite sure of that or don't you recall it?

A. I am quite certain because it was qualified after he had told me that he hadn't. It was his knowledge that he hadn't furnished those and we questioned him why was it—why had not \$100.00 in tools and books been furnished at that time and he stated he had been given permission to voucher for the full amount.

Q. That is what I am getting at, Mr. Koldewey. He had been given permission to voucher for it, is that correct?

A. That is what Mr. Smith told me. [48]

Q. Pending the obtaining of the balance of the tools, was that it?

A. No. He said he had been given permission to do this by Mr. Burke of the Veterans Administration.

The Court: Who is Mr. Burke?

Mr. Peterson: He is a witness here, your Honor.

Q. (By Mr. Wheeler): Did you check that statement with Mr. Burke, Mr. Koldewey?

A. Yes; I interviewed Mr. Burke.

Q. Now, in your contact with each one of these students listed on this voucher did you ask them if they had signed a receipt acknowledging acceptance of these tools? A. I did not.

Q. Did you investigate to determine whom had the possession and obligation for the issuance of tools at the Arizona Institute of Aeronautics?

(Testimony of Lewis W. Koldewey.)

A. That would be a hearsay statement. I was told that.

The Court: Let us not have any hearsay. We have enough of it so far without any more.

Q. (By Mr. Wheeler): In other words, you didn't make an investigation as to that responsibility?

A. Not beyond that point, and again that is hearsay.

Mr. Wheeler: I believe that is all at this time subject to recall, your Honor.

The Court: Call your next witness. [49]

Mr. Peterson: Mr. Albert Thomale.

ALBERT L. THOMALE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Albert L. Thomale.

The Court: It isn't Tomale?

The Witness: No, sir.

Q. (By Mr. Peterson): Where do you reside, Mr. Thomale?      A. 4136 Santa Barbara.

Q. Have you ever been a student in the Arizona Institute of Aeronautics?      A. Yes.

Q. How long have you been with them?

(Testimony of Albert L. Thomale.)

A. I started January 31 of 1949 and I quit in the last of 1950.

The Court: When?

The Witness: Wait a minute, the last of 1949. December of 1949.

Q. (By Mr. Peterson): Do you know Mr. Lewis W. Koldewey from the Federal Bureau of Investigation?

A. Yes, sir; I have met him.

Q. Did he interview you sometime in May of this year? [50]

A. You mean last year?

Q. Last year I mean.

A. I don't remember the date, but I know he interviewed me.

Q. I will hand you Government's Exhibit——

Mr. Wheeler: I object to that.

The Court: Let us determine whether he needs to have his memory refreshed. He knows what he received, doesn't he?

Q. (By Mr. Peterson): You knew when you were a student there you were to get a certain list of tools?

A. That is right.

Q. Did you ever get all of those tools?

A. Yes, sir, I got them all now.

Q. But before March 18 or March 25, 1949, had you received all the tools that you were supposed to get there at the school?

A. No.

Q. Did you receive all the books that you were supposed to receive?

A. No.

Q. You received them later on in the year?

A. That is right.



(Testimony of Albert L. Thomale.)

Q. Was that after this man, this defendant, Mr. Smith, left the school? A. Yes. [51]

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Albert, several others had left the school at that time, too, hadn't they? I mean of the original directors and officers, prior to March 18?

A. Several others had left. You mean the officers?

Q. Yes.

A. I don't know who you are referring to. I don't recall now.

Q. The only one you recall is Mr. Smith?

A. Yes.

Q. Now, Albert, who issued these tools to you? Did Mr. Smith issue them to you?

A. No; it was Fred Streicher.

Q. And when they were issued did you give him a receipt for the issuance of those tools?

A. Yes, sir; I believe I did sign a receipt.

Q. You signed a receipt. Now, I don't have the statement to refresh your memory with, but do you recall what that receipt was for?

A. It was for the tools.

Q. For how much? \$75.00 worth of tools?

A. Well, I never knew the price of them. We just had the list of tools. That is all we were signing. [52]

(Testimony of Albert L. Thomale.)

Q. And Mr. Streicher had you sign a receipt for these tools, is that correct?

A. That is right.

The Court: For all of them? Did you sign a receipt for all of them?

The Witness: I believe it was for the entire amount and he said we would get the rest later.

Q. (By Mr. Wheeler): Do you know whether or not, Albert, Streicher was an officer of this so-called Arizona Institute of Aeronautics at that time? A. I guess he was.

Q. Did he continue to so serve? A. No.

Q. Then there was one other person beside Mr. Smith who changed occupations out there, is that correct? A. That is right.

Q. You don't know where these receipts went that you signed or this receipt, to whom it was turned over to or what proceeding it went through?

A. I believe mine was in my record. I don't know. I may be mistaken, but I thought I seen mine in my record. After I quit school *I looking* through my record.

Q. Albert, does this course of instruction require some specialized tools? A. Yes, sure. [53]

Q. Were those tools at that time difficult to obtain, if you know?

Mr. Peterson: I object to that question.

The Court: Let him answer the question.

Mr. Peterson: The main thing in this suit, your Honor, is the fact that—suppose they were hard to get. He billed the Government for this stuff with-

(Testimony of Albert L. Thomale.)

out ever having delivered it and that is the violation.

The Court: I realize that and the jury has been so instructed, but this witness signed a receipt for all the tools and let us find out the circumstances.

I think it is a matter of common knowledge that tools were not difficult to obtain. I think I can almost take judicial notice of the fact that tools were not difficult to obtain in 1949, so you may ask the witness the question if he knows.

The Witness: I don't know.

Q. (By Mr. Wheeler): Was the issuance of these tools and books over a period of time or did you receive one bunch at one time and that was all, Albert?

A. Yes, we received most of them in one big bunch.

Q. As soon as you signed up for the course of instruction?

A. No, no.

Mr. Wheeler: I believe that is all. [54]

The Court: I want to clarify his testimony. As I understand you were issued a portion of the tools prior to March 18 and afterwards you received the balance of them?

The Witness: That is right.

The Court: Was that after a change had taken place out there?

The Witness: That is right.

The Court: Was that due to any complaint that you had made? Had you complained about the fact that you had not received all your tools?

(Testimony of Albert L. Thomale.)

The Witness: Not myself personally, no.

The Court: And then after Mr. Smith and Mr. Streicher left you received the balance of your tools?

The Witness: That is right.

The Court: That is all.

Mr. Peterson: That is all.

The Court: Call your next witness.

Mr. Peterson: Call Mr. Bustamente.

#### ANTONIO V. BUSTAMENTE

a witness called by the plaintiff, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Peterson:

Q. Will you state your full name, please? [55]

A. Antonio Bustamente.

The Court: You will have to speak up.

Q. (By Mr. Peterson): Where do you live?

A. 150 West Kennedy.

The Court: You are not doing a very good job of speaking up.

Q. (By Mr. Peterson): Were you ever a student in the Arizona Institute of Aeronautics?

A. I was.

Q. Were you a student there——

The Court: Can the jury hear the witness?

A Juror: Yes, we can hear him.

Q. (By Mr. Peterson): Were you a student

(Testimony of Antonio V. Bustamente.)

there during the months of February and March of 1949?      A. I was.

Q. Did you receive some tools from that institution?

A. Yes, sir; I received some tools, but up to March 18 I hadn't received them all.

Q. Did you later on receive them?

A. I did.

Q. Was that after Mr. Smith left the institution?      A. Yes, sir.

The Court: How did you come to receive the balance of them? What did you do? Did you do anything about it?

The Witness: No, not personally. [56]

Mr. Peterson: That is all.

### Cross-Examination

By Mr. Wheeler:

Q. Antonio, did you ever sign a receipt for these tools?      A. I believe I did.

Q. And by whom was that receipt tendered to you? I mean who gave you this receipt to sign?

A. Mr. Streicher.

Q. Was he an officer of this Arizona Institute of Aeronautics?      A. I believe he was.

Q. Now, you said you hadn't received all of the tools. What tools had you failed to receive up to March 18 of last year?

A. Well, I don't recall the tools I hadn't re-

(Testimony of Antonio V. Bustamente.)

ceived, but I have made a statement of the tools I hadn't received up to that date.

The Court: Would the statement refresh your memory?

The Witness: I think it would.

Q. (By Mr. Peterson): Government's Exhibit 10. Is that your signature? A. Yes, sir, it is.

Q. That is the statement you made to Mr. Koldewey? A. I did. [57]

Q. You don't have a copy of the receipt you signed for Mr. Streicher? A. No, I don't.

Q. You don't know what was written on it then?

A. Well, the receipt listed all the tools and I think it stated we were supposed to receive \$25.00 worth of books and then we just signed it over and handed it to Mr. Streicher.

Q. Do you know whether the tools that are listed here were included on that list?

A. Yes, they were.

Q. They were included? A. They were.

Q. A punch and file—a couple of files. Do you know the value of the tools, Antonio?

A. No, I don't.

Q. You never had to buy any since you graduated out there and started working as a mechanic? A. No, I haven't.

Q. Did you at any time lack for tools, Mr. Bustamente, during your schooling out there?

A. Will you repeat the question?

Q. Did you at any time ever lack for tools during your schooling out there?

(Testimony of Antonio V. Bustamente.)

Mr. Peterson: We object to that. That isn't the question. [58]

The Court: Objection sustained.

Mr. Wheeler: No further questions at this time.

Redirect Examination

By Mr. Peterson:

Q. This statement that you made and in which you were questioned by Mr. Wheeler, does that include the tools you did not receive?

A. Yes, sir.

Q. This statement that you have here does that include the tools that you did not receive until after Mr. Smith left is what I mean?

A. That is right. These are the tools I had not received.

Q. Had you received any books before Mr. Smith departed?

A. Yes. We received one notebook and a manual—manual No. 18, I think. I am not sure.

Mr. Peterson: I am going to offer this exhibit in evidence.

The Court: I don't think it is admissible.

Mr. Wheeler: I object to it.

The Court: He may refresh his memory from it and testify if it does refresh his memory, but I don't think the statement itself is admissible.

Mr. Peterson: He was questioned about it by counsel [59] for the defense at great length and



(Testimony of Antonio V. Bustamente.)

that questioning was not for the purpose of refreshing his memory.

The Court: He didn't follow it up. You may follow it up if you want. You may ask him from that statement if he can refresh his memory as to what tools were not furnished him and then he can testify as to what were not.

Q. (By Mr. Peterson): Will you refresh your memory from that and testify to the jury here and state what tools you did not receive?

A. Well, the tools I had not received was a center punch, size C; a file, a 10-inch file, a half-round, round, smooth—a file, 10-inch flat. One rawhide mallet. A pair of welding goggles. A pair of pliers, No. 356. One cold chisel, half-inch. One steel rule, 6 inch. One general protractor. Two C-clamps, 2 inch. Two C-clamps, 3 inch.

Q. That is all?

A. Those are the tools I had not received.

Q. Did you list any books on that?

A. As of March 18, 1949, the only books in my possession was a C. A. Manual 18.

Q. What?

A. A C. A. R. and a looseleaf notebook given by the school.

Mr. Peterson: That is all. [60]

### Recross-Examination

By Mr. Wheeler:

Q. You said, I think, Antonio, that you started to school on January 29?

(Testimony of Antonio V. Bustamente.)

A. No, sir; I started school on February 6th.

Q. February 6th?           A. Yes.

Q. And this was a month later that you gave Mr. Streicher a receipt for these tools and books?

A. I did.

Q. When did you sign this, Antonio? Do you mind my calling you Tony?

A. That is all right.

Q. When did you sign this statement, Tony?

A. March 18th.

Q. March 18th?           A. Yes, sir.

Q. Now, do you recall when you signed this receipt for Mr. Streicher and having received all of the tools and books?

A. Well, I recall signing the statement.

Q. You mean a receipt?

A. When I signed the receipt.

Q. Yes.

A. No, I don't recall the date that I signed the receipt. [61]

Q. Was it before you signed this, Tony?

A. It was before I signed this.

Q. And the punch and those two files and rawhide mallet and goggles and pliers and chisel and the rule and protractor and clamps were all that were lacking from the original tool kit, is that correct?           A. That is correct.

Q. Now, I think you said you—let me get the date clear. Was it February 6th this school started instructions?

(Testimony of Antonio V. Bustamente.)

A. Well, the school started the 31st of January. I started the 6th of February.

Q. Very well, Tony, thank you.

The Court: Any further questions?

Mr. Flynn: No questions.

The Court: That is all. Call your next witness.

Mr. Peterson: Mr. Urbano.

### JOAQUIN C. URBANO

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. Joaquin C. Urbano.

Q. And where do you reside?

A. 4526 South 11th Avenue. [62]

Q. Tucson? A. Yes, Tucson.

Q. Have you ever been a student in the Arizona Institute of Aeronautics? A. I have.

Q. Were you a student there during the early part of 1949? A. I was.

Q. Particularly during March?

A. Yes, sir.

Q. Now, did you receive some tools from the Institute when you went there as a student?

A. I did.

Q. And some books? A. Yes, manual 18.

The Court: Talk louder. Don't be afraid anybody is going to hurt you.

(Testimony of Joaquin C. Urbano.)

The Witness: I received a notebook and manual 18 and O-4 manual.

Q. (By Mr. Peterson): Did you receive all the tools that you were entitled to?

A. No, not before March 18th.

Q. Did you receive them any time before March 18th? A. No, sir.

Q. Did you receive them afterwards? [63]

A. Yes, sir.

Q. Was that after Mr. Smith left the school?

A. Yes, sir.

Q. But up until the time he left had you received all of the tools which you were supposed to have at the school? A. No, sir.

Mr. Peterson: That is all.

### Cross-Examination

By Mr. Wheeler:

Q. Joaquin, did you ever sign a receipt for Mr. Streicher saying that you had received all your tools in full prior to March 18th?

A. I signed a receipt, but I don't know whether it was for all the tools.

Q. You don't know what that receipt contained, do you, Joaquin? A. No, sir.

Q. And you don't know whether Mr. Smith ever saw that receipt or not, do you? A. No, sir.

Q. Mr. Streicher had possession of the tools and he was the one that gave them to you, was he?

A. Yes, sir.

(Testimony of Joaquin C. Urbano.)

Q. And you signed a receipt for the tools and books for Mr. Streicher, is that correct? [64]

A. Yes, sir.

Mr. Wheeler: No further questions.

Mr. Peterson: That is all.

The Court: Call your next witness.

Mr. Peterson: Oscar M. Gomez.

### OSCAR M. GOMEZ

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Oscar M. Gomez.

Q. And where do you reside, Mr. Gomez?

A. 340 East Pennsylvania Drive.

Q. Tucson? A. That is right.

Q. Have you ever been a student in the Arizona Institute of Aeronautics? A. Yes, sir.

Q. Were you there during the months of February and March of 1949? A. Yes, sir, I was.

Q. Did you receive some tools from that institution? A. Yes, I did.

Q. Did you receive all the tools that you were supposed [65] to receive? A. No.

Q. Did you receive some books? A. Yes.

Q. Did you receive all the books you were supposed to receive? A. No.

(Testimony of Oscar M. Gomez.)

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Oscar, where were these books published, do you recall? Were they Washington publications—publications by the Government, or do you recall?

A. No, I don't recall where they were published.

Q. You don't recall whether they were manuals out of Washington or not or anything of that sort? I am not trying to lead you too much. I am just trying to refresh your memory. If you don't know, you don't know.

A. No, I don't remember.

Q. Had you ever signed a receipt prior to this statement that you had received all your tools in full and the books? A. Yes, I had.

Q. By whom was that receipt offered to you, Oscar A. By Fred Streicher. [66]

Q. Did you keep a copy of that receipt?

A. No, I did not.

Mr. Wheeler: That is all.

The Court: Call your next witness.

Mr. Peterson: I will call Mr.—

The Court: Counsel, can't you stipulate that if the balance of the students were called their testimony would be more or less the same? In any event, their testimony would be cumulative, would it not?

(Testimony of Oscar M. Gomez.)

Mr. Wheeler: That would be my opinion, but Mr. Peterson is putting on his case.

The Court: Of course, but wouldn't the balance of the testimony be similar to the last witness?

Mr. Wheeler: That would be my reaction. I don't know, of course, what he intends to put on, your Honor. There may be deviations. If he wants a stipulation to that effect I will be glad to so stipulate.

The Court: I am merely suggesting it as a time-saver for everybody. We have heard three or four of them and if you will stipulate that the balance of the witnesses, and this is with reference to Count Two, that the students named herein would testify in substance to the same as the last witness.

Mr. Peterson: And we have also the three students in Count Two. [67]

The Court: All right, you can go to Count Two, but do you gentlemen care to enter into that stipulation?

Mr. Wheeler: Yes, I am quite willing to, your Honor.

The Court: It will save time for all of us.

Mr. Peterson: That is agreeable.

The Court: Very well, call your next witness.

Mr. Peterson: Mr. Hunt.



CHARLES R. HUNT

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. Charles R. Hunt.

Q. Where do you reside, Mr. Hunt?

A. Apartment 177, Consolidated Dwellings.

Q. Were you ever a student in the Arizona Institute of Aeronautics?      A. Yes, sir.

Q. Were you a student there during February and March of 1949?      A. March, sir.

Q. During the month of March?

A. Part of it.

Q. Did you receive some tools from the [68] Arizona Institute of Aeronautics?

A. Yes, sir; but I don't recall the date right now.

Q. Well, did you receive all the tools that you were supposed to receive?      A. Not in March.

Q. When did you receive them? Did you receive them after Mr. Smith left the school?

A. I don't recall the date, sir, myself.

Q. Well, do you know whether or not—

A. I signed receipts.

Q. Do you know whether or not Mr. Smith was in charge of the institution then or had he left?

A. Well, I would have to see the date that I signed the receipt first. I wouldn't recall that.

(Testimony of Charles R. Hunt.)

Q. Well, did you receive all the tools that you were supposed to receive?           A. Yes, sir.

The Court: At what time?

The Witness: Not at one time.

The Court: Not at one time?

The Witness: No, not at one time, no, sir.

The Court: Did you receive them in two different lots?

The Witness: Yes, sir.

The Court: What was the occasion of your receiving additional tools after the first issuance to you? [69]

The Witness: Well, they told us or I understood it that they were on order and they couldn't be obtained and they just had part of them available?

The Court: Counsel, the second count says "on or about the 19th day of April."

Mr. Peterson: Yes.

The Court: Had you received all your tools by April 19th?

The Witness: No, sir, I don't believe so.

Mr. Peterson: That is all.

### Cross-Examination

By Mr. Wheeler:

Q. Mr. Hunt, just one question. Could you by any chance tell where those books were published—these manuals that were spoken of earlier?

A. Of course, the manuals—anyone should know that they was published in Washington—a lot of them.

(Testimony of Charles R. Hunt.)

Q. Washington, D. C.?           A. Yes, sir.

Mr. Wheeler: That is all.

Mr. Peterson: That is all. I will call Mr. George Patterson. [70]

GEORGE E. PATTERSON

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Will you state your name?

A. George E. Patterson.

The Court: Just a moment. A juror indicates he wants to ask the witness a question.

A Juror: Any one of these witnesses, your Honor. I wonder if we could determine one of these dates when he entered school and when he got part of his tools and then when he finally got all of them—whether he was studying during this period.

The Court: Counsel will cover that with the next witness.

Mr. Peterson: It has been covered.

Q. (By Mr. Peterson): Just state your name, please. A. George E. Patterson.

Q. Where do you reside?

A. McNary, Arizona.

Q. And have you ever been a student at the Arizona School of Aeronautics?           A. Yes, sir.

Q. Were you in that school during the months of [71] February and March of 1949?

(Testimony of George E. Patterson.)

A. (No answer.)

The Court: When did you enroll?

The Witness: I enrolled March 14th.

The Court: When did you leave the school?

The Witness: The last of June of 1949.

Q. (By Mr. Peterson): Did you receive some tools from that school during those months?

A. Yes, sir.

Q. Did you receive all that you were entitled to before March 18, 1949?      A. No, sir.

Q. Or before April, 1949?

A. I can't recall the dates, sir.

Q. Well, do you recall when Mr. Smith left the school?      A. No, sir.

The Court: Do you recall making a statement to a representative of the Federal Bureau of Investigation?

The Witness: No, sir.

Mr. Peterson: He did not make a statement to him.

The Court: Did you receive all your tools at one time?

The Witness: No, sir.

The Court: They were delivered to you in two different lots?

The Witness: Yes, sir. [72]

The Court: What was the occasion of the delivery of the second lot, do you know?

The Witness: (No answer.)

The Court: Was it due to any trouble in the school?

(Testimony of George E. Patterson.)

The Witness: Well, that I don't know.

The Court: You don't know anything about that?

The Witness: No, sir.

The Court: All you know is you got the tools in two different lots?

The Witness: That is right.

The Court: That is all.

Mr. Peterson: That is all.

The Court: Any questions, Mr. Juror?

The Juror: Were they in training between the time—were they in school without the necessary tools?

The Court: I don't quite understand your question, Mr. Morgan. Will you ask it again?

Juror Morgan: Were they going to school without the necessary tools to get their training as mechanics?

The Court: Were you lacking in tools for a part of the time?

The Witness: Sometimes we were, yes, sir.

The Court: And was that because they had not been issued to you?

The Witness: Yes, sir. [73]

Mr. Peterson: That is all.

### Cross-Examination

By Mr. Wheeler:

Q. George, did you ever sign a receipt acknowledging that you received all the tools in full?

A. I believe I did, sir.

(Testimony of George E. Patterson.)

Q. You believe you did?           A. Yes, sir.

Q. Do you know by whom that receipt was tendered?

The Court: You started out with a pretty good voice but now you have quieted down for some reason or other.

The Witness: By Mr. Streicher.

Q. (By Mr. Wheeler): By Mr. Fred Streicher?

A. That is right, sir.

Q. Was he an officer in the Arizona Institute of Aeronautics, or do you know?

A. I don't know his position.

Q. But he was out there?           A. That is right.

Q. By whom were these tools issued?

A. (No answer.)

Q. I mean if you remember.

A. I don't remember.

The Court: Do you know from whom you received the tools, the first lot? [74]

The Witness: The first lot was Mr. Streicher.

The Court: From whom did you receive the second lot?

The Witness: Mr. Streicher, I believe.

Q. (By Mr. Wheeler): Now, was your school work ever held up for lack—your instructions out there, were they held up for lack of tools, George?

Mr. Flynn: Object to the question as immaterial.

The Court: The juror asked the question and I am going to let counsel follow it up.

Q. (By Mr. Wheeler): What was your answer?

(Testimony of George E. Patterson.)

The Witness: I do not recall in my class.

Q. (By Mr. Wheeler): In other words, you went right along with your studies without any inconvenience, is that correct, George?

A. Yes, sir.

Mr. Wheeler: That is all.

Mr Peterson: We object to that question and the answer. I don't think that has anything to do with the issues here.

The Court: The only thing is the juror started it and I helped him along and I couldn't foreclose the defendant from asking that question.

Of course I want to again emphasize there is only one question here and that is whether this defendant filed vouchers that were false or not true, and if they were not true did [75] this defendant have knowledge that they were not true. That is really the only question before the jury. In other words the filing of a false claim knowing it to be false notwithstanding the fact that they may have made good afterwards. That would be no defense.

Mr. Peterson: That is all.

Mr. Wheeler: We have no further questions.

The Court: Call your next witness.

Mr. Wheeler: The defense is willing to stipulate as to the remaining witnesses the same as we did earlier.

Mr. Peterson: That is all right.

The Court: You will stipulate that the remaining witnesses will testify the same as the last witness?



Mr. Peterson: Yes.

Mr. Wheeler: Yes.

The Court: Very well. You may proceed.

Mr. Peterson: Mr. Streicher.

### FRED W. STREICHER

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Peterson:

Q. State your full name, please.

A. Fred W Streicher.

Q. Where do you live, Mr. Streicher? [76]

A. 2639 North Woll (phonetic) Boulevard.

Q. Were you connected with the Arizona Institute of Aeronautics?           A. Yes, I was.

Q. Were you connected with that institution during the early part of 1949?       A. Yes, sir.

Q. Do you know the defendant in this case?

A. Yes, sir.

Q. G. Clifford Smith?           A. Yes, sir.

Q. Was he there at that time?    A. Yes, sir.

Q. What were your duties at the school during that period of time?

A. Well, mostly to get the school organized and get things rolling as far as setting up the school.

Q. Did you have anything to do with the giving of tools and books to the students?

A. The tools when they were received they were checked and found to be incomplete——

(Testimony of Fred W. Streicher.)

The Court: You will have to speak up so we can hear you.

The Witness: The tools we received from Sears Roebuck were found to be incomplete and they were checked by Mr. McConnell and myself and Mr. Smith and there was some question [77] about issuing the tools and we were told to go ahead, that the rest of them would be in shortly and would be completed.

The Court: Now, Mr. Reporter, will you read the answer?

(Answer read.)

Q. (By Mr. Peterson): How long did you remain at the school?

A. Oh, until sometime in the latter part of May, I believe. I don't recall.

Q. Had Mr. Smith already left there when you left?

A. Yes, sir.

Q. Now, were there any tools delivered to any of the students there before Mr. Smith left or were they delivered after he left—additional tools?

A. There were some additional tools that were delivered after Mr. Smith left.

Q. Did you know anything about—I will hand you Government's Exhibit 4 and ask you if you knew anything about that voucher which was issued as of March 18, 1949?

A. Well, I didn't know anything about it at the time but I did know later that it had been issued.

The Court: You heard about it afterwards?

(Testimony of Fred W. Streicher.)

The Witness: Yes, sir; that it had been issued.

Q. (By Mr. Peterson): Did you have any conversation at any time with Mr. Smith relative to the issuance of that voucher or other vouchers? [78]

A. No, not that I recall, only that there was a question about this voucher since the tools weren't complete and we were given to understand that it was okay to send this in.

Q. Who told you that? A. Mr. Smith.

The Court: Will you read the answer, Mr. Reporter?

(Answer read.)

The Witness: It really wasn't a question of this particular voucher. It was a question of vouchering for those tools and we were given to believe that it was okay to voucher for the tools because the balance of the tools and so forth would be forthcoming shortly.

Q. (By Mr. Peterson): Was that Mr. Smith who gave you that understanding? A. Yes, sir.

Q. Well, up until the time Mr. Smith left there never had been any additional tools or books given to the students, had there?

A. Will you state that again, please?

Q. Up until the time Mr. Smith had left the institution there had been no additional books or tools issued to the students?

A. No, they hadn't come in.

Q. That was done after Mr. Smith left?

A. Yes, sir. [79]

(Testimony of Fred W. Streicher.)

The Court: Just a moment. Who handled the financial affairs of the institution?

The Witness: Mr. Smith as far as I know. He was the treasurer.

The Court: He was the treasurer?

The Witness: Yes, sir.

The Court: You knew that the money came through for these tools, did you not?

The Witness: I knew that they had come through, yes.

The Court: And you knew the tools had not been delivered?

The Witness: That is right.

The Court: Did you ever discuss that with Mr. Smith?

The Witness: No, sir; only about sending vouchers for them is all.

The Court: You may cross-examine.

### Cross-Examination

By Mr. Wheeler:

Q. Mr. Streicher, to clarify a point if you will, did these students enroll in classes or was there staggered enrollment or what was the situation out there? A. Now that I don't know, sir.

Q. Well, I mean by that—you were out there, were you not?

A. Yes, sir, I was. I didn't have much to do in the office at that point. I was still working on different [80] items, getting things in working order for the school.

(Testimony of Fred W. Streicher.)

Q. At what point are you speaking of now?

A. Well, at the time when this all happened—this dilemma.

Q. Now, I believe you stated that Mr. Smith had control of the books and everything?

A. He had control of the ordering—all the ordering.

Mr. Wheeler: Do you have the earlier answer, Mr. Reporter?

Q. (By Mr. Wheeler): Now, Mr. Streicher, on the 9th day of May, 1949, in the case of G. Clifford Smith, plaintiff, versus Arizona Institute of Aeronautics Incorporated, a corporation, and Paul R. Ehlers individually and as president of the Arizona Institute of Aeronautics Incorporated, a corporation—

Mr. Peterson: We object to all this.

The Court: Let him finish the question.

Mr. Wheeler: Case No. 31909. Do you recall making that affidavit, sir? A. Yes.

Mr. Peterson: May I see that?

Mr. Wheeler: Yes, indeed, Mr. Peterson.

Q. (By Mr. Wheeler): Mr. Streicher, did you ever have occasion to voucher for any materials for the Arizona Institute of Aeronautics? [81]

A. No.

Q. You never signed a voucher yourself?

A. I did sign a voucher, yes.

Q. Just one voucher, sir?

A. Oh, I don't know—one or two.

Q. Pardon me? A. One or two maybe.

(Testimony of Fred W. Streicher.)

Q. Maybe a half dozen?

A. I don't really recall.

Q. Now, you at one time were a stockholder in this organization, weren't you?      A. Yes, sir.

Q. You are no longer a stockholder, are you?

A. Yes, I am.

Q. Are you?      A. Yes, sir.

Q. Did you at any time have occasion to turn your stock back to the organization?

A. Yes, sir, I did—part of it.

Q. And was that for an agreement and in consideration of certain withholding actions on the part of—

Mr. Peterson: Your Honor, I object to this line of testimony. It is improper cross-examination. It is something about the internal affairs of this corporation out there which has nothing to do with the charge against this [82] individual.

The Court: Will you read the question?

(Question read.)

The Court: Objection sustained. Counsel, let me say this. If you desire to show that this witness had any animosity toward the defendant you may bring that out, but the affairs of the corporation are not the problem of this court or this jury.

Mr. Wheeler: I think, may it please the court, it might apply to the credibility of this particular witness, showing that as treasurer of the corporation he had sole control of the financial affairs.

The Court: This was on May 9th?



(Testimony of Fred W. Streicher.)

Mr. Wheeler: That was when the reorganization took place. It refers back to this earlier period of time in which he testified. I don't bring it out for the purpose of impeachment if it please the court, but I think from the standpoint of the credibility of the witness that the jury is certainly entitled to know that this man was in charge of the financial transactions, at least partially, during this period.

The Court: This is an affidavit in which he states he was treasurer on May 9th and that is after the transactions involved in this case. If you want to bring in the books of the company——

Mr. Wheeler: Those have been subpoenaed, your Honor. [83]

The Court: I want to say for the benefit of counsel and the jury that we are only trying one case and one individual, and that individual is Mr. Smith. The question before the jury now is whether or not he is guilty of the charges alleged in this indictment. Matters that are brought in as to the affairs of the corporation or any difficulties the corporation may have experienced are not material to this case and we will proceed with the trial of this defendant and not of the corporation.

Q. (By Mr. Wheeler): Mr. Streicher, would it refresh your memory on these orders if you had the corporation's books to look at?

A. No, it wouldn't, sir, because I didn't have much to do with the books at all. I didn't have anything to do with them.



(Testimony of Fred W. Streicher.)

Q. Were you in any capacity out there with the company?

The Court: You are letting your voice fall, too. You are getting the same habit.

Mr. Wheeler: Well, I thought I might get him to raise his voice, your Honor. That was my purpose. I thought there would be the opposite reaction. I can speak louder.

The Court: I know you can. That is the reason I made the comment.

Mr. Wheeler: But I was in hopes of getting a little more volume from the witness. [84]

The Court: It is bad enough for the witness to make us suffer let alone attorneys.

A Juror: May I ask a question?

The Court: Yes.

A Juror: I can't get it straight in my mind why these receipts were signed in full before the things were delivered. That seems to kind of bother me.

The Court: Can you explain that, Mr. Witness?

The Witness: No. Only that the balance of the tools were to be forthcoming very shortly and that it was stated on the receipts that they would receive those as soon as they came in.

The Court: Isn't it a fact that you had the receipts signed in full to support your claim?

Mr. Wheeler: Well, now, your Honor——

The Court: Do you know whether they signed a receipt in full?

The Witness: I was told to get the receipts signed that way.

(Testimony of Fred W. Streicher.)

The Court: By whom?

The Witness: By Mr. Smith. In other words, I was working under Mr. Smith's direction.

A Juror: Did this receipt show that they hadn't received all the tools and would receive them later?

The Witness: Yes. I think all the tools that they hadn't [85] received were checked and there was a notice saying that they would get them just as soon as they came in.

Q. (By Mr. Wheeler): Am I right, Mr. Streicher, then in assuming from your statement to the jury that the students knew these tools were on order and would receive them?

A. That is right.

Q. I don't believe you answered my question as to what capacity you held with this company?

A. That is something I don't know either.

Q. Well, did you have any honorary title, sir?

A. Well, originally I was supposed to be employed as office manager but that never materialized.

Q. Didn't you have an office to manage?

A. No.

Q. Were you president or vice-president?

A. I was vice-president of the corporation, yes.

Q. Were you in charge of instructions and organization? A. No, sir.

Q. You didn't have that title? A. No, sir.

The Court: What were you doing for a living at about that time?

The Witness: As I stated before, your Honor, I was working with Mr. McConnell in getting the

(Testimony of Fred W. Streicher.)

school organized, so we could get it started and start our first classes under [86] the direction of Mr. Smith.

The Court: Who was the head of the school?

The Witness: Mr. Smith.

The Court: Were you one of the organizers?

The Witness: Well, you might call it that.

The Court: Who was the party that started this school?

The Witness: Mr. Smith started it. He had the foundation for it which was very good as far as I could see.

The Court: Then you became associated with Mr. Smith, you and the others?

The Witness: Yes, sir.

The Court: And formed this corporation?

The Witness: That is correct.

Q. (By Mr. Wheeler): Did you become associated with Mr. Smith or did you become associated with the Arizona Institute of Aeronautics?

A. Became associated with the Arizona Institute of Aeronautics.

Q. When you first became associated with this school was it incorporated?

The Witness: It was being incorporated.

The Court: It was being incorporated?

The Witness: In the process, yes, sir.

The Court: By whom?

The Witness: By the rest of the stockholders.

Q. (By Mr. Wheeler): Would you say that this statement would more or less clarify the position of

(Testimony of Fred W. Streicher.)

the institute out there? You had a shoe string operation and were trying to give instruction to veterans, is that not true?

A. It possibly could be stated that way, yes, sir.

Q. That is about as briefly stated as it could be?

A. Yes, sir.

Q. Do you recall whether you were an officer in this corporation prior to March 18th?

A. Yes.

Q. Of 1949? A. Yes, sir.

Q. You were an officer? A. Yes, sir.

Q. Now Mr. Streicher, was there a normal check and balance in the flow there so that a person—for example did the president of the company know what was being ordered for tools and equipment and supplies? A. He could have.

Q. Well, now, I might be president too but I am asking you a question—did he know?

A. That I don't know. I don't know.

Q. Not that he could know.

Mr. Peterson: We object unless we know the man's name. I don't know who the president of the company is. [88]

The Court: Counsel, you are asking what somebody else would know. How would he know what somebody else knew?

Mr. Wheeler: Well, he is testifying as an officer of the corporation, your Honor, and I am trying to see how widespread his knowledge was as to these purported purchases and so forth and if it went through the regular channels or if it was simply

(Testimony of Fred W. Streicher.)

chopped off when Mr. Streicher received the receipts for these various tools. I think it is quite material in determining any intent.

The Court: I haven't any objection to this witness testifying to something he knows but I am wondering how he would know what somebody else knew. Can you answer the question?

The Witness: No, sir, I can't.

Q. (By Mr. Wheeler): You didn't attend any of the meetings of the corporation officers?

A. Very few—maybe one or two.

Q. Do you know, Mr. Streicher, whether or not in the middle of March, 1949, there were some books in the post office to be delivered to the Arizona Institute of Aeronautics?

A. No, I don't recall.

Q. Now, there were some of these students, I suppose, that hadn't received all of their tools and books, Mr. Streicher?

A. That is right. [89]

Q. And those were the vouchers you put through earlier yourself?

A. Not that I recall, no.

Q. You recall signing or vouchering for some?

A. Yes, sir.

Q. You wouldn't say at this time how many?

A. No, I wouldn't know.

Q. Well, now, I am not being over repetitious I hope, but with the court's permission what I am getting at is this, did you get a block of students in there on March 10 or any day in March for instruction?

(Testimony of Fred W. Streicher.)

A. I wouldn't recall that.

Q. In other words you don't know—were you out there sufficiently to know whether these students lacked tools or books during their instruction course?

A. Very few. There weren't any tools to speak of that we were lacking.

Q. And the school kept operating with the intent of instructing these students and keeping them going, is that correct?      A. That is right.

Q. Fred, I hand you a copy of the contract originally entered into—will you mark this as Defendant's—

Mr. Peterson: There is a copy already in evidence.

Mr. Wheeler: But we have this one [90] underlined.

Mr. Peterson: We object to it if it is underlined.

Mr. Wheeler: Let me have the original copy and I will call attention to the matters I have in mind. May I have a few moments, your Honor?

The Court: Counsel, we have been delayed this morning several times. I am not saying it is your fault, but I am trying to get this case to the jury this afternoon.

Mr. Wheeler: Yes, I am well aware of that, your Honor. I believe that is all of this witness at this time, your Honor.

The Court: Any further questions from this witness by counsel for the Government?



(Testimony of Fred W. Streicher.)

Mr. Peterson: Just one moment—just one question.

Redirect Examination

By Mr. Peterson:

Q. You stated that you thought that the boys expected to have the rest of the tools at a later date, is that correct?      A. Yes, sir.

Q. But they had not received them at the time Mr. Smith left the school?

A. That is right.

Q. In the meantime had Mr. Smith filed vouchers which covered those tools, to your knowledge?

A. Not to my knowledge. I wouldn't know.

Mr. Wheeler: I am sorry, but I can't hear [91] you.

The Witness: I say I don't know.

Q. (By Mr. Peterson): He left the school at about what date?

A. I think it was around May 23rd if I am not mistaken.

Q. Are you sure whether it was April or May?

A. April or May. I just don't recall the date.

Mr. Peterson: That is all.

The Court: That is all. Call your next witness.

Mr. Peterson: The Government rests.

The Court: You may proceed, Mr. Wheeler.

Mr. Wheeler: May it please the court, we would like to have an opportunity of arguing a motion here. We have two motions in fact and we at this time move to dismiss this action.



The Court: The motion will be denied.

Mr. Wheeler: As to the other matter the court might desire to have it argued in the absence of the jury.

The Court: Very well. We will take a recess until 1:45.

The jury will remember the court's admonition not to discuss the case among yourselves or permit anybody to discuss it with you and you are not to express or form any opinion until the case is finally submitted to you.

You will be excused until 1:45 this afternoon.

(Whereupon the jury retired from the courtroom.) [92]

The Court: You may proceed, Mr. Wheeler.

Mr. Wheeler: The first motion, your Honor, is predicated on the thought and theory that there is a material defect in this indictment in that the sums alleged vary so materially from those set forth in the indictment that it is sufficient to again renew our motion to dismiss insofar as the Government's case is concerned. The evidenciary matters are in conflict and I think the conflict is of a serious nature.

The Court: What is the conflict?

Mr. Wheeler: The conflict is a matter of \$54.60 on the first count and \$23.40 on the second count.

The Court: You mean they didn't charge the defendant with embezzling enough money?

Mr. Wheeler: That might be one reaction to it. They should have set forth definitely in their charge the amounts that they allege.

The Court: I don't think there is sufficient variation to argue about.

Mr. Peterson: The voucher speaks for itself. The original voucher was for \$100.00 for a student and they allowed a 10 per cent carrying charge and 2 per cent discount.

The Court: I am going to let the jury settle this case. I feel a prima facie case has been established. I have been watching the evidence rather carefully and I think it is sufficient to make a prima facie case. [93]

Mr. Kipnis: I would like to make one observation to the court.

As the United States Attorney stated the voucher speaks for itself but I would like the court to direct its attention to the certification by Mr. Smith. I believe both of them are alike. I would like the court to follow the reading of it.

The Court: I will take your word for it. You read it. I am not questioning you, counsel.

Mr. Kipnis: The certification is that the bill is correct; that payment has not been received and all conditions have been complied with and state and local sales taxes are not included.

It is a certification merely as to the correctness of a bill and that is a specific and separate certification which bears the signature of the payee, Arizona Institute of Aeronautics, by G. Clifford Smith and I would like also for the court to take judicial notice of the statement as follows, which is signed by an authorized certifying officer, H. P. Thomas, whom the Government has so very, I suppose, negligently

neglected to bring in here. He certifies that the articles were received in good condition after duly inspecting and after acceptance and delivery prior to payment as required by law. I submit to your Honor——

The Court: Simply because the Government has not produced [94] everyone who might have had something to do with these transactions does not excuse this defendant.

Mr. Kipnis: No, I am not making that point, your Honor. I am making the point that the certification signed by the school—by Mr. Smith——

The Court: Let me see it.

Mr. Kipnis: Is that the bill is correct and the Government's own testimony is that approximately \$100 worth of tools were delivered, so the bill was correct.

Mr. Peterson: We don't say "approximately."

The Court: Equipment furnished beneficiary of the veterans administration and so forth, as appear in the attached schedule.

This is to certify that the articles represented were delivered to the trainee and that the institution has on hand and available for inspection by the Veterans Administration evidence of such delivery and expenditures. That no amount received from the Government is used or will be used as a rebate, prize or other payment in goods or money to the veteran trainee.

He certifies that is true.

Mr. Kipnis: No, he does not. He certifies the bill is correct.

The Court: He says:

“I certify the above-bill is correct and [95] just; that payment thereof has not been received and that statutory requirements,”

and so forth

“have been complied with.”

And above there is a statement in typewriting stating that the books and supplies and equipment had been furnished.

Mr. Kipnis: The point I am trying to make is that there is a statement as distinct and separate from a certification as can be and was signed by the school. That states that the requirements of the United States Code is that the certification be correct and that the statement signed by the school, by the defendant is that the bill is correct and just.

The Court: But isn't Mr. Thomas the Government officer who certifies to the correctness of the bill?

Mr. Peterson: He is certifying to that, yes.

The Court: Is he authorized as the certifying officer?

Mr. Peterson: Yes.

The Court: Isn't he an administrative officer in the Veterans Administration who audits the bills?

Mr. Peterson: Yes. He probably thought it was all right at the time he received it but it showed up later as not being correct.

He didn't have any means of finding out what had happened at the school—that there had been a false claim filed until the matter was investigated. At

the time of the receipt of [96] that he might have said "So far as we know this bill is correct," but we are now showing it was not correct.

Mr. Kipnis: The only point I am trying to make is that there is a variance between the statement in the voucher and the statement of certification. A separation of the documents shows there are two separate and distinct items. The top one is a reference to the preparation of the voucher and so forth and the number available and so on and then right on the bottom is a separate certification and I submit that that has not been proved to be wrong.

Mr. Peterson: The charge in this case is that somebody fooled the Government, that is the charge, by issuing a false claim. Now, you can't fool the Government except through an agent.

The Court: Mr. Smith certified to that and as far as I am concerned he will have to explain it to the jury. The motion is denied.

Tucson, Arizona, Tuesday, April 11, 1950, 1:45 P.M.

(Whereupon, at 12:00 o'clock noon a recess was had until 1:45 o'clock p.m. of the same day.) [97]

Tucson, Arizona, Tuesday, April 11, 1950, 1:45 p.m.

The Court: Will you stipulate the jurors are present and in the jury box and the defendant in court with his counsel?

Mr. Wheeler: So stipulated, your Honor.

Mr. Flynn: Yes, your Honor.

The Court: You may proceed.

Mr. Kipnis: I would like to call Mr. Robbeloth.

CLETUS F. ROBBELOTH

having been previously sworn, was recalled and testified on behalf of the defendant as follows:

Direct Examination

By Mr. Kipnis:

Q. Were you present, Mr. Robbeloth, at the time the original negotiations were entered into prior to the formation of this school?

A. I was present during all the negotiations between the Veterans Administration and the Arizona Institute of Aeronautics.

Q. Did you know when the original contract, which I believe is in evidence as a Government exhibit, when that contract was delivered to your office?

A. Signed and confirmed by the San Francisco office—may I refer to my records? [98]

The Court: Certainly.

The Witness: On March 9, 1949, my office received a teletype from the reviewing office of the Veterans Administration in San Francisco authorizing us to distribute the contract in the form it presently is.

Q. (By Mr. Kipnis): When did you distribute the contract in this present form?

A. Within the next day—that day or the following day.

The Court: What do you mean by “distributing the contract”?

The Witness: The contract is made up in six copies, your Honor, all of which are retained by the



(Testimony of Cletus F. Robbeloth.)

Veterans Administration subject to review and approval by the reviewing office.

Two copies are forwarded to that office and when they indicate that it has been approved they notify us that the contract has been approved and rather than sending them back we then distribute the other four copies, one of which goes to the school, one is kept in my office and two go to the finance officer of the Veterans Administration, from where one is forwarded to the general accounting office in Washington.

Q. (By Mr. Kipnis): How did the school operate from the time of—February 1st or January 31st until the final [99] order, the contract received approval?

A. The school operated under a memorandum agreement. It is a general contract which says the school will offer such services and the Government will pay for such services at rates and in particulars to be determined and set forth in a formal contract at a subsequent date.

Q. So that from the time of January 31st until actually you received confirmation this contract then was not binding upon the school?

A. Yes, that contract was binding.

Q. It was binding but wasn't that subject to change by either the office at San Francisco or the Washington office?

A. From the day that a memorandum agreement was negotiated, the entire negotiations were subject



(Testimony of Cletus F. Robbeloth.)

to mutual agreement between the school and the Veterans Administration within the limits of the Veterans Administration regulations.

Q. What I am getting at is this. Didn't the San Francisco office or the Washington, D. C., office have the right to make any changes that they thought were requisite in this particular contract?

A. They had the right—they did not have the right to make changes in the contract. They could either accept it as is or return it for revisions upon which the school would have authority to agree or disagree. [100]

The Court: Counsel, what is the materiality of that?

Mr. Kipnis: That there was a time when this school operated under a memorandum agreement, which is not yet introduced into evidence, and which I would like the jury and court to know about.

The Court: I think the memorandum agreement is in evidence, is it not?

The Witness: Yes, sir; it is a part of the contract identified as Exhibit A to the contract.

The Court: What was the date of the contract?

The Witness: The date of the contract was February 28, 1949.

The Court: I don't see the materiality of this line of questioning.

Mr. Kipnis: If the court please, according to the testimony just heard neither the San Francisco office nor the Washington, D. C., office had the right to reject this entire contract.

(Testimony of Cletus F. Robbeloth.)

The Court: Counsel, the question here is whether there was a false claim.

Mr. Kipnis: I realize that.

The Court: And that is the issue, whether it was knowingly false.

Mr. Kipnis: The issue is knowingly false and that is what I am trying to get at. [101]

The Court: If a man submits a claim for goods that he bought and claims \$75.00 for them when they cost \$58.58 and he knows it, whether there was a contract or not, it would be a false claim.

Mr. Kipnis: If the court will bear with me instead of giving me examples which I believe are very prejudicial—

The Court: I am telling you that line of questioning is out of order. You may take your exception and proceed.

Q. (By Mr. Kipnis): Mr. Robbeloth, referring again to the contract, do you know whether it was required that the school deliver all the tools and books at one time?

A. I know that it is not required that they deliver them all at one time.

Q. And would you refer to the contract with particularity to Article I under instructions, subsection (d)?

A. Yes, sir.

Q. And was that—will you tell the jury just the effect of that particular section.

Mr. Kipnis: We have a complicated contract here, your Honor.

The Witness: That section provides that the con-

(Testimony of Cletus F. Robbeloth.)

tractor will furnish outright to the Veterans as needed such books, supplies and equipment as are necessary for the satisfactory pursuit and completion of the courses as referred to in paragraph C. It is understood and agreed that the books, [102] supplies and equipment to be so furnished will consist of those items required but in no instance greater in variety, quality or amount than are required by the contractor to be provided personally by other and all students pursuing the same or similar courses.

Q. (By Mr. Kipnis): In the interest of time, your Honor, I would like to have reference to the article where the delivery of tools and books as required—

The Court: It was just read, was it not?

Mr. Kipnis: And also in the rules and procedures which we referred to earlier this morning.

The Witness: I could state that substantially the same thing exists in the regulations and the rules and procedures.

Q. (By Mr. Kipnis): That delivery as needed.

A. Delivery as needed.

Q. Mr. Robbeloth, did you have negotiations with any other officers or members of this corporation?

A. Yes, sir. My first contact with the Arizona Institute of Aeronautics, to the best of my memory, was with Mr. Clifford Smith and Mr. Paul Ehlers together in my office.

Q. Were there any other officers that you had contact with?

(Testimony of Cletus F. Robbeloth.)

A. During the course of later events I believe I had [103] occasion to discuss the Veterans Administration business with every officer of that company save three who are identified as military personnel.

Q. I will ask more specifically, up to and including March 18 did you have occasion to confer or negotiate with other officers or members of this corporation?

A. I don't know the exact day, Mr. Kipnis, but approximately March the 18th Mr. Ehlers and Mr. Skruggs, representing the corporation, Mr. Streicher and Mr. McDonald or McConnell came to the Veterans Administration in Phoenix to represent the school in a matter.

Q. I see.

A. I was in on the conference.

Q. Do you know how the estimated costs were established to be the basis of \$100 as far as tools and books were concerned?      A. Yes, sir.

Q. How were they arrived at?

A. The school submitted a list of tools which were required of all persons enrolling there. They submitted two lists. In fact, one was for one course and one for another.

That list was examined by the Veterans Administration, myself and others, and found to be in accordance with the tools normally required for those types of courses and we compared the tools to retail prices which were prevalent in Phoenix [104] at that time and determined that the would not exceed

(Testimony of Cletus F. Robbeloth.)

\$75.00 in one amount and of \$100.00 in the other list.

Q. Do you know of your own knowledge who it was that prepared these lists for the school?

A. I was told by several different people who prepared the list.

Q. Well, do you know who prepared the list?

A. I didn't see them prepared.

Mr. Kipnis: Nothing further.

The Court: I have a few questions I would like to ask this witness.

Are you familiar with the methods followed in the filing of public vouchers?

The Witness: Yes, sir.

The Court: With the Veterans Administration?

The Witness: Yes, sir.

The Court: Do you know a person by the name of H. P. Thomas?

The Witness: Harry R. Thomas.

The Court: I see a signature here purporting to be the signature of the authorizing agent. Do you know whose signature that is?

The Witness: H. R. Thomas, yes, sir.

The Court: What is his position?

The Witness: He is chief of the voucher auditing section [105] of the financial division of the Veterans Regional office—Veterans Administration Regional Office.

The Court: It is a Governmental office connected with the auditing of these claims?

The Witness: Yes, sir.

The Court: Any further questions, gentlemen?

Mr. Peterson: No, your Honor.

The Court: That is all.

Mr. Kipnis: I would like to call Mr. Burke to the stand.

### PATRICK BURKE

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kipnis:

Q. Will you state your name, Mr. Burke?

A. Patrick Burke.

Q. Will you state your position, Mr. Burke?

A. Contract negotiator for the Veterans Administration, Ellis Building, Phoenix.

Q. And did you hold that office sometime in 1949?

A. 1949 at the date of these particular issues I was the contract negotiator for the Veterans Administration located in Tucson.

Q. At the time, on or about January, 1949, were you familiar with these negotiations and these contracts? [106]

A. Yes, sir; about January, 1949, Mr. Smith and Mr. Ehlers contacted me in regard to preliminary negotiations at which time I informed them that we could only contract with an approved school and since they hadn't received approval they would have to meet the first qualification and that was all that happened in the month of January to my knowledge.



(Testimony of Patrick Burke.)

Q. Did the school to your knowledge—was the school in existence—I will withdraw that.

Did the school finally receive approval?

A. It received approval from the Civil Aeronautics Administration and the State Governor's council.

Q. After this approval was received were you part of these preliminary negotiations?

A. Then Mr. Smith called me out to his office one day and stated he had cost data prepared in order to substantiate tuition rates and cost for books and supplies and equipment.

I explained to him at that time that it was not my function—it was the function of Mr. Robbeloth and that he would have to forward that matter to Phoenix.

Q. Did you have conferences with any other officers or members of this school prior to March 8 other than Mr. Smith?           A. Yes, sir.

Q. Would you name those officers or [107] persons?

A. Well, there was Mr. Paul Ehlers, whose title was president, I believe, Mr. Frederick Streicher, whose title was vice-president.

Q. There was a Mr. Smith, Clifford Smith. I believe his title was director of the school and treasurer of the corporation at that time?

A. There was an attesting by Mr. Lawrence (phonetic) who was the official secretary of the corporation.

I was introduced to a Lt. Neville and Capt. Wiley



(Testimony of Patrick Burke.)

who were stockholders. That is all that I know, Mr. Kipnis.

Q. Now, do you know who prepared these estimated costs or these process schedules?

A. No, sir, I don't.

Q. Was there any conversation with any other officer or member of this corporation other than Mr. Smith in discussing the correctness of these costs?

A. The costs, Mr. Kipnis, were negotiated strictly with Mr. Robbeloth.

Mr. Kipnis: Nothing further, your Honor.

Mr. Peterson: No questions.

The Court: I have a question to ask.

There was a statement this morning—were you present in court this morning?

The Witness: Yes, sir.

The Court: There was a statement that you told them it [108] was all right to go ahead and bill the Government for these articles before they were delivered.

The Witness: I heard that statement made, your Honor.

The Court: Is that true?

The Witness: No, sir. Mr. Smith called my office early in February and stated he had services rendered on July 31 and as such could he bill the Veterans Administration for those services.

I informed Mr. Smith that I did not have a copy of the contract. The usual procedure was when one was negotiated a copy would be sent to me at my office in Tucson and that he only had a memoran-

(Testimony of Patrick Burke.)

dum agreement; that he could bill for the services of January 31st if he so chose but there would be no payment until the contract was issued.

Subsequently, in the middle part of February, he telephoned again and stated that the corporation needed money and I told him that was strictly his responsibility. He wanted to know if he could bill for the services rendered. I told him I did not know the individual terms of the contract and wouldn't until I received a copy of it.

I explained to him that my duties and assignment at Tucson was to audit all educational institutions in the southeastern area and that they run a schedule and I would audit his concern July 31st and if the equipment was not delivered and the records so showed it then I would so report [109] it.

That was my conversation with Mr. Smith.

The Court: Then you did not tell Mr. Smith at any time, in substance or in effect, that he could bill the Government for supplies or tools and equipment before they were delivered? You can answer that yes or no.

The Witness: That sir—Mr. Smith called me about the issuance—not the billing—

The Court: I have asked you a question.

The Witness: I never told anyone, sir, they could bill the Government for supplies not issued.

The Court: And that includes Mr. Smith?

The Witness: Including Mr. Smith.

The Court: That is all I have.

(Testimony of Patrick Burke.)

Mr. Kipnis: Did you have occasion to discuss with Mr. Smith, however, the rules and procedures with particular reference to paragraph 80-B? If you wish to refer to your record you may.

The Witness: Paragraph 80-B is on cost data—determination of fair and reasonable cost.

Q. (By Mr. Kipnis): Your discussion with him was that the costs were to be fair and reasonable costs in conformity with the regulation?

A. That wasn't my concern, Mr. Kipnis. That was with Mr. Robbeloth. [110]

Q. Did you have a conference with him concerning manual 7-5? Paragraph 101-C? That is in preparation of the contract. Did you discuss that matter with him?

A. In the preparation of the contract?

Q. In preparing the estimated costs.

A. No, sir, Mr. Kipnis. I had nothing to do with the cost data whatsoever. I was not a contract negotiator at that time.

Q. I am sorry. I perhaps am not making myself clear. But in this discussion—in these discussions with Mr. Smith did the question of estimated costs come up?

A. Yes, sir. Mr. Smith brought the subject up to me one day.

Q. Of estimated costs?                      A. Yes, sir.

Q. And in that discussion of estimated costs did the regulations come into the conversation?

A. Yes, sir.

(Testimony of Patrick Burke.)

Q. As distinguished from the contract. You are not the contracting officer? A. Correct.

Q. But you did have conversation with Mr. Smith concerning the rules and procedure?

A. Correct, sir.

Q. Now, in connection with those regulations and rules [111] of procedure did you have, do you recall, a discussion concerning—telling Mr. Smith that the—or what in effect regulation 80-B—paragraph 80-B—that is the fair and reasonable compensation? A. Yes.

Q. In effect? A. Yes.

Q. And in effect also the preparation of the cost of books and tools? A. Yes, sir.

The Court: You will have to answer that audibly.

The Witness: Yes, sir.

Mr. Kipnis: Northing further, your Honor.

The Court: That is all. Call your next witness.

Mr. Kipnis: I would like to call Mr. Fred Streicher.

The Clerk: You have been sworn, Mr. Streicher?

The Witness: Yes, sir.

### FRED W. STREICHER

called as a witness by the defendant, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kipnis:

Q. Mr. Streicher, were you familiar with the

(Testimony of Fred W. Streicher.)

rules and regulations concerning the estimated costs?

A. No. [112]

Q. What was your authority with the corporation—  
—with the school insofar as having authority to sign  
vouchers or receipts?

A. That is about all—only anything that Mr.  
Smith directed. In other words, I was working  
under him.

Q. You are not answering my question. You  
had authority, did you or did you not have authority  
to sign receipts and vouchers for and on behalf of  
the corporation? A. Yes, sir.

Q. Did you or did you not have authority to sign  
checks for and on behalf of the corporation?

A. No, I did not.

Q. Were you in charge of the distribution of  
the tools to the various students? A. Yes.

Q. Were you in charge also of seeing that those  
tools were in correct amounts?

A. Well, not entirely, no.

Q. Well, you had the duty of distributing the  
tools, didn't you? A. Yes.

Q. Was it then your duty to account to some  
other member of the corporation as to whether those  
tools were distributed?

A. No, just to get the receipt from the students  
and [113] that went in the files of the corporation—  
the student files I should say.

Q. Who did you give the receipts to?

A. Well, they were given to the girl in the office  
and put in the student files.

(Testimony of Fred W. Streicher.)

Q. Now then was it your procedure to check these tools as they came in and give them to the students?      A. Yes, sir.

Q. And then get a receipt for them?

A. Yes.

Q. And then you gave the receipt to the girl to file?      A. That is right.

Q. Did you check the items off as they came in?

A. They were all checked. In fact those tools were checked by Mr. McConnell and Mr. Smith and myself.

Q. I am asking about your checking them?

A. Yes.

The Court: Do you mean by that that you individually checked them or all three of you checked them together?

The Witness: All three of us checked them together.

Q. (By Mr. Kipnis): At what time did all three of you check them together? When they were delivered from the supplier?

A. When they were delivered, yes.

Q. And how about when they were given to the students? [114]

A. Well, they were issued to the students right after they were checked. They came in in bulk and we put them in their boxes and they were issued to the students as they came in.

Q. Now, were all three, McConnell, yourself and Mr. Smith, present at each time you delivered the tools to the students?      A. No.



(Testimony of Fred W. Streicher.)

Q. Isn't it a fact that you were the one that was delivering them to the students? A. Yes.

Q. You and you alone? A. Yes.

Q. And that the others weren't anywhere near it?

A. Well, at times they were. Yes, they had access to the office. They were watching the procedure.

Q. You were the one that gave them the receipt and told them to sign? A. That is right.

Q. Did you see those vouchers, the receipts that you obtained from the students after delivery school?

A. Did I see them?

Q. After you delivered them to the girl in the office? A. No.

Mr. Kipnis: No further questions. [115]

The Court: Any questions?

Mr. Peterson: No, your honor.

The Court: That is all.

Mr. Kipnis: I would like to call Emily Hammes.

### EMILY HAMMES

called as a witness by the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kipnis:

Q. Will you state your name?

A. Emily Hammes.

Q. Emily, what was your connection with this school? What was your first connection with this school in 1949?

A. Well, I started working there the 21st of



(Testimony of Emily Hammes.)

February I believe, and the day I went to the school—I received a job through an employment agency. I was told that Mr. Streicher was the office manager. I was to work for him and for a Mrs. Welcom (phonetic) who was Mr. Smith's secretary.

Q. Now, what was your position—what were your exact duties?

A. Well, there was a lot of different duties, such as talking to the students when they came in and filing, writing advertising letters and checking bills.

I did some work on the books such as posting and writing checks. [116]

Q. During the course of your employment did Mr. Streicher give you certain receipts that the students had given him for tools and books?

A. Yes. I got some of those receipts and filed them in their personal files—the students' personal files. Each one had a large file.

Q. When did you leave the employ of the Arizona Institute of Aeronautics?

A. Sometime in the first part of May.

Q. Did you know or do you know of your own knowledge whether or not any documents, letters or other information that was kept from Mr. Smith?

A. Yes.

Q. Would you relate that to the court, please?

A. Well, I know that after Mr. Smith left there was mail that came there for him and letters that was never forwarded to him and some that was destroyed.

The Court: You mean that was after he left?

(Testimony of Emily Hammes.)

The Witness: Yes.

The Court: During the time he was employed there do you know of any information that was withheld from him?

The Witness: No, I don't.

Q. (By Mr. Kipnis): Emily, do you know of any books or records that were not accepted for delivery until Mr. Smith left? [117]

Mr. Peterson: We object to that, your Honor.

The Court: Read the question.

(Question read.)

The Court: She may answer the question if she knows.

The Witness: Well, I can't remember, your Honor, but I do remember—I just can't remember when it was but there was a box of books that was in the post office for quite some time and they were finally brought out there. They were books that were supposed to have been delivered to the students but I don't remember the dates—just when it was.

The Court: Was that because they were c.o.d.?

The Witness: No.

Mr. Kipnis: Would you read the question and answer?

(Question and answer read.)

The Court: Do you know whether it was during the time when Mr. Smith was there or afterwards?

The Witness: Well, that was after he left—after they had the first meeting.

(Testimony of Emily Hammes.)

The Court: That was after he left?

The Witness: Yes.

Q. (By Mr. Kipnis): Did anyone tell you not to pick up those books or not to have them delivered?

A. No. I was never supposed to get them.

Q. Well, how do you know there was—there was a package in the post office? [118]

A. Well, from just hearing the talk in the office.

Q. Emily, who made up the vouchers?

A. I made some of them and Mrs. Welcom made some of them.

The Court: Show the witness these vouchers and ask her if she made any of them.

Mr. Kipnis: If your Honor will bear with me I would like to try the case in my own way.

The Court: I am interested in the truth. I am not interested in the way you try your case. I want to bring out the truth.

Mr. Kipnis: I think your Honor should bear with the defense.

The Court: I don't care to hear any more comments from counsel. What we want is the facts and the truth.

Q. (By Mr. Kipnis): Did you make up this voucher dated March 18? Would you remember that?

The Court: Refer to the exhibit number, counsel, so we will know which one you are referring to.

Mr. Kipnis: I believe that is exhibit number—

The Clerk: Government's Exhibit 4, your Honor.

(Testimony of Emily Hammes.)

Q. (By Mr. Kipnis): Exhibit No. 4.

The Witness: I have no way of knowing whether I made this up or someone else did. They are all made out in a certain form and they all have to be just like this. They [119] are never initialed. I can't tell whether I made this out or not. I don't remember. I made out some like this but I don't remember the names of the boys or anything so I don't remember whether I made this particular one or not. They all have to be made on this same form and with the same information.

The Court: I would like to have the reporter read the answer.

(Answer read.)

Q. (By Mr. Kipnis): I show you this exhibit marked No. 6. The date of this one is April 14. Will you look at it and see if you can recognize that as one you made out?

A. I don't know whether I made it out or not.

Q. What was the office practice then as to making out these vouchers? By that I mean who would do the dictating?

A. I don't remember of anyone ever dictating a voucher. We took it off the records that were on cards and out of the files.

Q. Then as far as you were concerned you just took the records out of the file. Did you compare the receipts that were in the students' files and make out the vouchers? Is that it? A. Yes.

Q. Do you know whether Mrs. Welcom had the same [120] office practice as well?

(Testimony of Emily Hammes.)

A. I believe she did.

Mr. Kipnis: Nothing further, your Honor.

Mr. Peterson: Just a moment. That is all.

The Court: Call your next witness.

Mr. Kipnis: I will call Mr. Nivelle who was subpoenaed on behalf of the school with the corporation books and records.

The Bailiff: This witness claims he has not been subpoenaed.

The Court: He is in court, is he not?

The Bailiff: Yes, your Honor.

The Court: That is all I need.

### CHARLES B. NIVELLE

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kipnis:

Q. Will you state your full name?

A. Charles B.

Q. Do you have the books and records of the Arizona Institute of Aeronautics, Incorporated, with you?      A. Not with me, no, sir.

Q. Do you know where they are?

A. Part of them have been turned over to [121] Mr. Peterson and part of them are in the auditor's office. Those pertaining to this trial I believe are in Mr. Peterson's possession.

Mr. Kipnis: If your Honor please, a subpoena

(Testimony of Charles B. Nivelles.)

was issued and served, duces tecum, for the books and records of this corporation. I would like at this time to make a demand that they be produced whether Mr. Peterson has them or someone else has them or the school.

The Court: If anyone under the jurisdiction of this court has the books and records I am perfectly willing they be produced. Do you have any of the books, Mr. Peterson?

Mr. Peterson: I wouldn't classify them as books. There were some records of some kind that had no bearing on this case, but I will produce anything that they want.

The Court: Whatever you have that was obtained from the corporation I am perfectly willing be produced.

Mr. Peterson: I have a report here made by—

The Court: He wants the books and the records of the corporation.

Mr. Peterson: Shall I go to the office and bring them?

Mr. Kipnis: That was the purpose of the subpoena duces tecum—to have the books here.

The Witness: Your Honor, I was not subpoenaed at all. I had the records and I brought what I had that I was asked to bring and gave them to Mr. Peterson and that is all I have [122] received. There was no subpoena whatever.

The Court: Can you produce them?

Mr. Peterson: They are on my desk.



(Testimony of Charles B. Nivelles.)

The Court: You had better get them and in the meantime this witness can be withdrawn.

Mr. Kipnis: Very well, your Honor.

The Court: Mr. Witness, you will remain in the courtroom. You are not excused. Haven't you another witness you can call, counsel?

Mr. Kipnis: If the court please, we have only one other witness and that is the defendant himself.

The Court: And his examination will take some time.

Mr. Kipnis: I would not like to have his testimony interrupted so with your Honor's permission I would like to ask for a few minutes recess or wait until Mr. Peterson comes back.

The Court: We will take a five-minute recess at this time. Ladies and gentlemen, you will bear in mind the admonition of the court heretofore given.

(Short recess.)

The Court: Do you stipulate, gentlemen, the jurors are all present and in the jury box and the defendant is in court with his counsel?

Mr. Wheeler: So stipulated.

Mr. Flynn: So stipulated. [123]

The Court: You may proceed.

#### Direct Examination

By Mr. Kipnis:

Q. Will you state your full name?

A. Charles Nivelles.

Q. Will you state your present position in this



(Testimony of Charles B. Nivelle.)

school? A. President and general manager.

Q. I show you this document here. Can you identify this?

A. That is the record book of the corporation.

Q. That is the minutes of the meetings?

A. Yes.

Q. Are these loose leaf pages?

A. Some of those may be other things. I haven't had a chance to run through it.

Q. I see. Would you look at this record book and let me know what office Mr. Fred Streicher held in October of 1948 in the corporation?

A. I don't believe I could tell you that from this record. I don't know. I was not in the corporation. I knew nothing of it at that time and I don't know whether I can tell from this or not without going through it—without reading the whole thing.

Q. Well, as far as you know this record book is substantially [124] correct, is it not?

A. That record book is not necessarily absolutely correct because I don't know—I wasn't here when the book was formed. That is the record that was turned over to me.

Q. Would you know Mr. Streicher's signature if you saw it? A. No, sir, I couldn't swear to it.

Q. Would you know who the president of this corporation was at the beginning?

A. From the record only.

Q. Well, do you know?

A. I know the records say G. Clifford Smith or

(Testimony of Charles B. Nivelles.)

Paul Ehlers was the president and G. Clifford Smith was the director.

The Court: You say you are now president and general manager of this school?

The Witness: Yes, sir.

The Court: When did you become such?

The Witness: About June 23rd, sir. I am not the Lt. Nivelles that was the original stockholder. I am a brother.

Mr. Kipnis: If your Honor please, I am looking for the vouchers which were subpoenaed starting with February 1st and 2nd and which apparently are not here.

The Witness: Look in the other folder. [125]

Q. (By Mr. Kipnis): Would you be familiar with this document?

A. You mean this one in particular?

Q. Yes, this one in particular.

Mr. Peterson: What is the date of that?

The Witness: March 9.

Mr. Peterson: I think we can save some time here. This witness testified he had nothing to do with this company until after June 23rd. All those matters were before June 23rd.

The Court: He can answer the question more quickly than you can make an objection. If he wasn't there at the time he isn't familiar with it.

The Witness: That is the answer, sir.

Q. (By Mr. Kipnis): I didn't hear your answer.

A. The answer is no, I am not familiar with it.

Mr. Kipnis: Nothing further from this witness at this time.

The Court: Any questions?

Mr. Flynn: No questions.

The Court: That is all. Do you want this witness to remain here?

Mr. Kipnis: I would like the court to have him remain.

The Court: Very well. Call your next witness.

Mr. Kipnis: Mr. Smith, will you take the stand?

### G. CLIFFORD SMITH

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Kipnis:

Q. Will you state your full name, please?

A. G. Clifford Smith.

Q. Will you state your position with the Arizona Institute of Aeronautics from its inception to about the beginning of 1949, to January 1, 1949?

A. From the beginning I was one of the original organizers of the Arizona Institute of Aeronautics.

At the initial incorporation meeting, held sometime in September in the office of the attorney, I was elected to the position of president originally and then at the request of the other stockholders I was given the position of treasurer.

As treasurer I was in control of the funds only insofar as my own signature was concerned. Two signatures were required on all checks.

(Testimony of G. Clifford Smith.)

I secured the equipment for the school in New York City and various places in Arizona.

I employed the head instructor who met with the approval of the other stockholders.

Q. Will you state his name, please? [127]

A. William P. McConnell. And I employed all of the employees in the school.

I did all of the original negotiating with the Veterans Administration.

Q. Now, would you state the arrangement concerning the operation of this school—that is among the incorporators?

A. The division of work was set up so that Mr. William P. McConnell had complete charge of all the instruction in the shops.

Mr. Fred Streicher had charge of all records and books of the corporation and it was my duty to formulate policy; contact the Veterans Administration and in that respect I depended upon Mr. McConnell and Mr. Streicher to supply me with the necessary information.

Q. Now in connection with that where did you get your information concerning the list of tools and books?

A. The information was given to me by Mr. McConnell who had previously been an instructor at an aeronautical school in New York City and who advised me that they were the necessary tools to have and advised me as to their approximate cost.

I took his information to the Veterans Adminis-

(Testimony of G. Clifford Smith.)

tration, using that for my discussion with them.

Q. Now, did you submit that list of tools and that list of estimated costs to the officers of the Veterans [128] Administration?

A. Yes, sir, I did. I took the list as submitted to me by Mr. McConnell with his estimated cost figures and took them and submitted them to the Veterans Administration officials.

Q. When did you receive notification that that list was a correct or approved list from the standpoint of the Veterans Administration?

A. Well, it was indicated by the Veterans Administration in the original negotiations that the list would be satisfactory.

That list was then made a part of the contract as submitted to the school by the Veterans Administration. It was made a part of the memorandum agreement which was dated January 30th or 31st and was later incorporated in the contract that was issued sometime in March.

Q. What was your understanding of the preliminary negotiations with the officers of the Veterans Administration on the basis of trying to work out a proposition where the school had not been in existence for the six months period?

A. Well, in the discussions with the Veterans Administration it was pointed out to them that we had no cost experience to go on. They apparently understood the situation because of the waiver of the six months operating clause and were content

(Testimony of G. Clifford Smith.)

with the estimated cost analysis of [129] tools, equipment and what not.

It was also the understanding that we could bill for tools and materials used upon receipt of the approval of each student by the Veterans Administration regardless of when that approval should come in. We could only bill for tuition after the services had been rendered.

It was also the understanding that because of the quantity of tools that were being ordered in large lots that there would be delay in delivery of some of the items. That was confirmed through discussions with Sears Roebuck, which were handled by Mr. Streicher, Mr. McConnell and myself, both singly, individually and on several occasions together.

Q. Once this contract or memorandum agreement was approved do you know whether or not orders were placed to secure all of the tools, books and equipment?      A. Yes, sir, I do.

Mr. Flynn: We object to that as not the best evidence. If there was any order the writing or record of it would be the best evidence.

Mr. Kipnis: Your Honor, I have to establish whether or not there were any orders.

The Court: He has answered the question. What good would it do to strike the answer?

Q. (By Mr. Kipnis:) Where did you place the orders?

A. Orders for the tools that were to be used by



(Testimony of G. Clifford Smith.)

the [130] students were originally placed with the Tucson Auto Parts through Mr. Streicher. When they indicated that they were unable to deliver the tools in quantity except by prepayment, the orders were then placed with Sears Roebuck who promised 10 to 15-day delivery because they had to be secured out of town in the quantity that we wanted.

Q. Where were the orders placed for the books?

A. The orders for the books were placed with the printing office of the Federal Government in Washington, D. C. They were also placed through a publishing house in New York City. I don't recall the name of the publishing firm.

There were, I believe, two different firms in New York City with whom orders were placed.

Q. I show you a document here and I would like to know if you can identify this?

A. Yes, sir, I can.

Q. Will you state what that is?

Mr. Peterson: Just a moment. We object to it. We would like to see what it is. We don't know what it is.

Mr. Kipnis: Have you any objection to him stating what it is?

Mr. Peterson: We object to any questions asked about this document. It doesn't have anything to do with the allegations in the indictment.

The Court: May I see it? What is the contention of [131] counsel as to the admissibility of this paper?



(Testimony of G. Clifford Smith.)

Mr. Kipnis: If you Honor please, it was testified to by officers of the Veterans Administration that this contract was not actually received back in Tucson until late in March.

I would like the court to know and we think it has a direct bearing upon the intent and knowledge of this defendant, because of a practice that has been established.

Mr. Peterson: Well, I don't think counsel is stating the testimony correctly. Mr. Robbeloth testified that the contract itself was in full force and effect and distributed on March 9, 1949. There is nothing in that document there that has anything to do with the charges in this case. I don't even know what it is.

The Court: I don't see any materiality, counsel. It is just another voucher covering another transaction which is not involved in this case.

Mr. Kipnis: If your Honor please, this is one of a series of transactions where there was a course of conduct which was set in practice with the knowledge of the Veterans Administration.

The Court: Just a moment, counsel. The Veterans Administration can't waive the provisions of the statutes of the United States. I don't think this is material.

Mr. Kipnis: If your Honor please, the transactions were one. [132]

The Court: Do you contend those transactions were handled just as these were?

Mr. Kipnis: Yes.

(Testimony of G. Clifford Smith.)

The Court: Then that would be a good thing for the FBI to have knowledge of.

Mr. Kipnis: I believe so. And I think it is rather unusual that the corporation which has entered into every one of these——

The Court: Counsel, one violation does not justify another.

Mr. Kipnis: But if your Honor please, this is a method of doing business that the corporation was engaged in before this man entered into this charge——into the allegations that are charged here.

Mr. Peterson: No corporation can violate——

The Court: Counsel, let us not argue about that. I am going to sustain the objection.

Mr. Peterson: I object to it as immaterial and not bearing on the issues in this case.

Q. (By Mr. Kipnis): I show you Government's Exhibit No. 4 and I would like you to relate to this court and this jury the circumstances under which you signed this certification.

A. This is a voucher.

Mr. Peterson: Just a moment. I object to that question. [133] It is absolutely indefinite. It isn't any particular question.

The Court: Counsel, I feel the defendant should have equal latitude in making any explanation that may justify his conduct within reason. I am going to overrule the objection and let him tell his story.

The Witness: Thank you, sir. This is a voucher that was submitted to the Veterans Administration by the Arizona Institute of Aeronautics.

(Testimony of G. Clifford Smith.)

It is one of many vouchers made up in the office. The vouchers are made up by or were made up by the girl employed in the office who took from the files the information necessary, such as the listing of the names of the approved students and after filling them in they would be presented to an officer of the company for signature.

In that particular voucher I signed it after checking the receipts signed by the students which showed that all of the tools had been issued and received by them.

Q. (By Mr. Kipnis): I would like to show you these instruments here. Will you tell the court what that document is?

A. This is a list of tools which is a receipt for tools issued and received by a student.

Q. What is the signature on that?

A. Antonio V. Bustamente.

Q. Do you recall whether that receipt or an original [134] receipt of this—similar to this, was in the files before you signed that voucher?

A. The original receipt was in the file because they were checked when I signed the vouchers, because it was not my duty to sign vouchers.

Mr. Kipnis: I would like to have this marked Defendant's Exhibit A and offer it in evidence.

The Clerk: Defendant's Exhibit A for identification.

(The document referred to was marked Defendant's Exhibit A for identification.)

(Testimony of G. Clifford Smith.)

The Court: May I ask counsel, if you have receipts for each one of these parties?

Mr. Peterson: If they are the ones testified or whom we stipulated to they can be admitted right now.

Mr. Kipnis: These are the ones who testified.

The Court: Submit them as one exhibit.

Mr. Kipnis: In connection with all the different witnesses.

The Court: Mark them as one exhibit instead of having the clerk do a lot of clerical work. I am trying to save him some trouble.

The Clerk: Thank you. These will be Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A and received in evidence.)

The Witness: Do you wish me to go on?

Mr. Kipnis: Just a moment.

Q. (By Mr. Kipnis): In your duties as director did you have occasion to question some of the students as to whether or not they received all the books and tools and so forth?

A. No, sir, I did not have occasion to question the students on it because that duty was delegated to Mr.—

The Court: You have answered the question. Just answer counsel's questions.

The Witness: I am sorry, sir.

Q. (By Mr. Kipnis): At the time when you

(Testimony of G. Clifford Smith.)

executed this particular voucher did you certify that the bill submitted was correct and that you had not previously received payment for it?

A. I did. There is a certification on here to that effect, that the bill was correct as submitted.

Q. Now, what was your understanding of your signature being required to this voucher?

A. That an officer of the company was required to sign all vouchers submitted to the Veterans Administration and since I was the only available one I signed this one as well as the other voucher.

Q. Do you know of your own knowledge the date of the first particular voucher that was submitted?

A. Yes, sir, I do. The first voucher was submitted within one or two days after receipt of the contract from the Veterans Administration, which was prior to the date on this voucher.

Q. Do you know who signed that first voucher?

A. Fred W. Streicher signed the first voucher.

Q. Do you know how many vouchers—that is the total in dollars and cents, that were signed up until March 18th or April 14th?

A. Up until April 14th?

Q. Yes.

A. There was approximately \$3,200 worth of vouchers submitted to the Veterans Administration by April 14th.

Q. And as far as you know was the procedure followed—the same procedure followed in submitting each particular voucher?

(Testimony of G. Clifford Smith.)

A. The same routine procedure was followed in submitting each voucher—that is the making up of the voucher by the office girl and the checking with the record and the signing by an officer.

Q. Mr. Smith, did you receive any benefit or profit as a result of this—of either of these two vouchers?       A. No.

Mr. Peterson: We object to that. That is not material in this case. [137]

The Court: The answer will be stricken and the jury instructed to disregard it as immaterial.

Mr. Kipnis: Nothing further, your Honor.

#### Cross-Examination

By Mr. Peterson:

Q. Mr. Smith, who first made the original contact with Sears Roebuck in regard to the tools which were to be delivered to these boys?

A. The original contact was made by Mr. McConnell and myself together.

Q. Was that the time when you arranged with the credit manager for credit?

A. No, sir, it was not.

Q. When did you arrange that credit agreement with Sears Roebuck?

A. There was no arrangement of credit made with the credit manager. Mr. McConnell and I contacted the manager of the hardware department of Sears Roebuck and after Mr. McConnell had passed upon the acceptability of the tools that Sears Roe-



(Testimony of G. Clifford Smith.)

buck had to offer, I authorized the manager of the hardware department to place an order and deliver them to the school. They were to be delivered on a c.o.d. basis.

It was later that a credit arrangement was made with Sears Roebuck.

Q. How much later? [138]

A. Well, I believe it was sometime in February that a credit arrangement was made because of our inability to pay for the tools completely at the time.

Q. Now, you stated on direct examination that you ordered other tools. From whom did you order those?

A. I stated that originally tools were ordered from the Tucson Auto Parts. They were ordered by Mr. Fred Streicher and because of the inability of the Tucson Auto Parts to supply them Mr. McConnell and I went to Sears Roebuck.

Q. Well, I mean after you distributed the first tools to the students out there, tools received from Sears Roebuck, was there any further orders?

A. There were additional orders placed with Sears Roebuck as new students were enrolled in the school.

Q. Was that before you left or after you left?

A. We started approximately four or five classes of students before I left. With each class of students we ordered tools.

The Court: When you talk about "additional tools" you mean additional kits of tools?



(Testimony of G. Clifford Smith.)

The Witness: Additional sets, yes, sir.

The Court: The original order was for certain specified tools?

The Witness: That is correct, the complete tools for [139] each student.

The Court: Then as you ordered additional tools that means additional kits?

The Witness: That is correct, sir.

Q. (By Mr. Peterson): Now, when you say this voucher was prepared, Government's Exhibit No. 4, that you have in your hand, did you go to the files yourself and personally obtain the receipts which you say you took as the facts in order to sign that voucher?

A. I personally checked the receipts signed by the students. I did not fill out the voucher.

Q. Where did you find them?

A. Pardon me?

Q. Where did you find those?

A. They were in the personal file of each student.

Q. You went down and took each one of those files out?

A. Yes, sir; because I was not familiar with what students were there or whether the tools had been issued.

Q. Did you check to see whether or not those students had received all of their equipment?

A. That was not part of my duty.

Q. You were the general manager and director?

A. That is correct, sir.

(Testimony of G. Clifford Smith.)

Q. And you signed that voucher? [140]

A. That is correct.

Q. Did you read the top of the voucher?

A. I did, sir.

Q. You certified that you knew that the goods had been delivered and were delivered at the time of signing that voucher and issuing that voucher?

A. I certified that the bill was correct, sir.

Q. And you also—did you read the top of that?

A. Yes, sir, I did.

Q. That the goods were delivered and that you knew that? A. (No answer.)

Q. That is what you certified to?

A. Yes, sir.

Q. Did you make any check whatsoever to see that that was a fact—the affidavit made on the vouchers issued to the Government?

A. I did not check each student.

The Court: May I ask a question, Mr. Smith? You were not able to get a full kit of tools from Sears Roebuck, were you?

The Witness: Not at one time.

The Court: I mean when the initial order was placed they were not able to completely fill the list of tools that were specified in the contract? [141]

The Witness: That is correct.

The Court: While you were there did you get additional tools from anybody?

The Witness: We received additional tools to fill out the total list, from Sears Roebuck from time to time.

(Testimony of G. Clifford Smith.)

The Court: And these students, as I understand it, received the additional tools on March 18th?

The Witness: I don't know whether they had received them, your Honor, because I didn't distribute them or handle them.

The Court: You have heard the evidence here, Mr. Smith?

The Witness: Yes, sir, I have.

The Court: And the statement of the students that they received only part of their tools and the rest were not received until after you had severed your connections with the institution?

The Witness: I heard that, sir.

The Court: And is that true?

The Witness: I do not believe it is completely true, sir.

The Court: Well, you knew whether or not the tools had been delivered to the institution?

The Witness: No, sir, I did not.

The Court: Had anybody else ordered tools besides yourself? [142]

The Witness: Yes, sir.

The Court: Who?

The Witness: Mr. Streicher kept checking with Sears Roebuck as well as myself and Mr. McConnell. There were tools delivered during various periods when I was in Phoenix or out of the office.

The Court: Then as I understand your testimony you didn't know of your own knowledge whether these receipts reflected the truth or not?

(Testimony of G. Clifford Smith.)

The Witness: Of my own knowledge no, sir.

The Court: You relied upon these statements?

The Witness: That is correct, sir; I did.

The Court: And that is your contention here today?

The Witness: That is right, sir. I couldn't handle every phase of it myself.

The Court: The only thing I am asking you if that is your position?

The Witness: That is correct, sir.

Q. (By Mr. Peterson): You mean to say that you signed a voucher which was to be presented to the Government, an instrumentality of the Government, without checking up and knowing whether it was the truth or not?

A. I contend that you have to depend to a certain extent, sir, upon other people and that I had checked the [143] fact that those tools were issued and a receipt signed.

Q. Yes, but Mr. Smith, you knew at the time that this voucher was issued that all of the tools had not been delivered, didn't you?

A. Of my own knowledge I did not know that, Mr. Peterson.

Q. What were your duties out there?

The Court: Ask the question the other way. Did he know that they had been delivered?

The Witness: May I have the question again?

The Court: Did you know that they had all been delivered?

(Testimony of G. Clifford Smith.)

The Witness: I know that there were complete kits issued to various students and that there were some students who did not have complete kits and some of the students had more tools than others. Not all of them had the same tools because of the limited quantity of each item delivered.

Q. (By Mr. Peterson): Well, Mr. Smith, I am asking you about the particular ones whose names are contained in that voucher which you signed.

A. Yes, sir. What is the question?

Q. Did you know whether they had not or had been delivered to them?

A. To my knowledge they had been delivered, Mr. Peterson. [144]

Q. They had been delivered? A. Yes, sir.

Q. Was anything ever said to you about any further tools which were to be delivered before you left the institution?

A. Yes, sir. Mr. Streicher and Mr. McConnell kept telling me that the complete tools ordered had not yet been delivered. As a result I constantly kept checking with Sears Roebuck.

Q. And they were not delivered until after you left the school, is that correct?

A. No, sir, that is not completely correct.

Q. I mean for these particular boys that are mentioned in this voucher?

A. I can't answer that, sir. I don't know to my knowledge that they were.

Q. Now, you say it was the understanding that

(Testimony of G. Clifford Smith.)

you could bill for goods—bill the Veterans Administration on a voucher for goods at any time you desired whether they were delivered or whether they were not?

A. No, sir. It is my—it was my understanding that you could bill for tools and expendable materials immediately after receiving the approval of the student by the Veterans Administration, regardless of when, during the month, that approval came in.

Insofar as tuition was concerned, regardless [145] of when the approval of the student came in, we could only bill at the end of the month.

Q. Well, you are not asking the question I asked you.

A. I am sorry.

Q. I asked you if you had the understanding that you could bill for these tools at any time whether they had been delivered or not, if they were supposed to be delivered at some future time. Is that your understanding?

A. It was my understanding we could bill for the tools as they were received by the school.

Q. And delivered to the student?

A. No, sir; as they were received by the school.

Q. Did you ever read that before? Did you read it before you read it here in court today?

A. Yes, sir.

Q. That isn't what that says, is it?

A. No, sir.

The Court: That is argumentative, counsel.



(Testimony of G. Clifford Smith.)

Q. (By Mr. Peterson): Where did you get the understanding from?

The Court: Just a moment. The voucher is here and it speaks for itself.

Mr. Peterson: I am trying to ask him what he thought about that statement on the document. He said that he had [146] an understanding—

The Court: He said he had an understanding?

Mr. Peterson: Yes; he stated that in his direct examination.

The Court: Very well, you may proceed.

Q. (By Mr. Peterson): Did you think that anybody in the employ of the Government could authorize you to violate that statement—the statement that is on that document that you have in your hand?

A. No; there was no violation authorized by anyone in the Government. May I clarify the other answer?

Q. Your counsel can do that.

The Court: I will let him clarify it.

The Witness: The reason for that was that the school held the responsibility of the tools for the entire time the student was enrolled in the school. They were to be retained by the school, on the school premises, and issued to the students only as they needed them—as they progressed from shop to shop which did not make it of paramount importance that the student receive the tools, but that the school received the tools.



(Testimony of G. Clifford Smith.)

The Court: Then Mr. Smith if that was true why did you check the receipts? Why did you think it was necessary to check the receipts to find out whether the tools had been delivered to [147] the students?

The Witness: Because, sir, I was not signing vouchers for the school and this was the first voucher presented for my signature and in order to make sure that the voucher was correct I checked.

The Court: But you said it was your understanding when the tools were delivered to the school that you could then bill the Government for them?

The Witness: That is correct, sir.

The Court: And yet you thought it was necessary to check the receipts to be sure the students had received the tools?

The Witness: Because this was an unfamiliar duty of mine, sir.

Q. (By Mr. Peterson): You stated on direct examination, Mr. Smith, that you placed further orders for tools?      A. That is right.

Q. Do you know where you could find copies of those orders?

A. I don't believe I would be able to find copies of those orders, Mr. Peterson.

Q. What institution did you say you ordered them from?

A. Sears Roebuck & Co. Originally an order was placed with the Tucson Auto Parts in Tucson.

Q. Did you hear the testimony of Mr. — the

(Testimony of G. Clifford Smith.)

man [148] from Sears Roebuck when he told us what he had here in court included all the orders he ever had from your school?

A. I heard that.

Q. Up to the time you left.

A. I heard that.

Q. Then you never placed any further orders?

A. After the dates that he mentioned?

Q. Yes, after the original order.

A. The orders were placed verbally with the manager of the hardware department, Mr. Peterson.

Q. Did you make any showing on the books of the company?      A. Only as——

Q. Or on the records?

A. Only as they were received by the company.

Q. Well, did you have any documents out in the Arizona Institute of Aeronautics which showed that you had received any further tools or books during your period out there?

A. Yes, sir. There were receipts for all tools and books that were delivered at the school. They were received by Mr. Streicher and kept by him.

Q. Kept by him?      A. Yes.

Q. Who kept the books of this [149] organization?      A. Mr. Streicher.

Q. All the books?

A. Yes, sir; they were his responsibility.

Q. Did he keep the personal files of these gentlemen or boys you testified to?

(Testimony of G. Clifford Smith.)

A. Yes, sir, he did.

Q. Who was the regular bookkeeper for the corporation?

A. The girl employed to do the posting in the books was Mrs. Hammes who worked under Mr. Streicher.

A. Did she work under you?

A. Indirectly she did.

The Court: Mr. Smith, you testified that you were the treasurer and took care of the payment of bills?

The Witness: That is correct, sir.

The Court: Did you pay these bills that are represented by Government's Exhibit No. 2?

The Witness: These are the Sears Roebuck bills?

The Court: Yes.

The Witness: I paid some of the bills issued by Sears Roebuck to the company. My signature was not the only authorized signature.

The Court: I understand that but you audited them—you okayed them?

The Witness: Yes, sir; I did. There was a dual signature required on checks and I did pay [150] part of them.

The Court: Do you know of any other tools that were purchased besides those that were purchased from Sears Roebuck?

The Witness: During the time that I was connected with the company, you mean?

(Testimony of G. Clifford Smith.)

was instructed that in the event tools were not delivered to cross them off the tool list and issue new receipts as the additional tools came in because those records had to be correct for the inspection of the Veterans Administration.

Q. Was the Veterans Administration in continual check with you—that is did you have rather frequent visits by some officer or member of the Veterans Administration during your term as director?

A. Well, if there wasn't a visit from a representative of the Veterans Administration there was always telephone contact so that almost daily I was checking with the Veterans Administration as to the proper procedures that I should operate under.

Q. In Tucson as well as Phoenix?

A. In both places.

Mr. Kipnis: Nothing further, your Honor.

A Juror: May I ask a question? [153]

The Court: You may ask the question but the witness will not answer it until I direct him to.

A Juror: Did he as treasurer personally receive the checks that correspond with these vouchers?

The Court: You might show him the checks. Can you answer that question?

The Witness: Yes, sir.

The Court: Have you seen those?

The Witness: Yes, sir, I saw them this morning.

Mr. Kipnis: Will you answer the question?

(Testimony of G. Clifford Smith.)

The Witness: No, I did not directly receive the checks issued to the school.

A Juror: Were the checks deposited to the credit of the corporation immediately upon receipt of the checks?

The Witness: Yes, sir, they were without exception. The checks were picked up in the post office and brought to the school and then deposited in the account of the corporation. I did not even endorse the majority of the checks. In some cases they were taken direct from the post office to the bank.

Mr. Wheeler: We might stipulate that one check bears Mr. Smith's signature for deposit and there is some unknown signature on the other one. We haven't been able to make out the endorsement on the other one, your Honor, but it is stamped by the Institute and endorsed by some unknown [154] party.

The Court: Do you know the signature?

The Witness: No, I do not know the signature but I may be able to explain it.

The Court: Your endorsement is not on the check.

The Witness: No, sir.

Mr. Peterson: I don't think, your Honor, no matter who cashed the check that that has anything to do with this particular case. It is who filed the vouchers.

The Court: Just a moment. I will take care of

(Testimony of G. Clifford Smith.)

that in my instructions. Do you have any questions?

Mr. Peterson: No questions. That is all.

Mr. Kipnis: The defense rests.

The Court: Any rebuttal?

Mr. Peterson: No, your Honor.

The Court: How long do you want to argue?

Mr. Peterson: Very short time for me, your Honor. I think about 10 minutes.

Mr. Wheeler: May we have a few minutes prior to that, your Honor? May we have a few minutes before closing?

The Court: You mean you want a recess?

Mr. Wheeler: Yes.

The Court: Very well, we will take a recess at this time.

Mr. Wheeler: We have rested our case and presume there is no rebuttal. [154]

The Court: So it is ready for argument?

Mr. Wheeler: Yes.

The Court: And you want a recess before you argue?

Mr. Wheeler: Yes.

The Court: Very well, we will take a recess for a few minutes at this time and the jury will bear in mind the admonition of the court heretofore given.

(Short recess.)

The Court: Do you stipulate, gentlemen, that



the jurors are present in the jury box and the defendant is in court with his counsel?

Mr. Peterson: So stipulated, your Honor.

Mr. Wheeler: Yes, your Honor.

The Court: You may proceed.

### Opening Argument on Behalf of Plaintiff

By Mr. Peterson:

Ladies and gentlemen of the jury, I don't intend to take a great amount of time arguing the testimony in this case. It has been short, brief and concise.

The court has told you what the issue in this case is as to each count of the indictment, and that is to determine whether or not the defendant in this case signed a voucher and filed it with a Government agency knowing the same to have been false and before the goods were delivered.

I will ask you before you determine [156] your verdict in this case to look at Exhibit No. 4 and read the printed statement made at the heading of that document, that this defendant was aware of at the time he filed that document or should have known from his position which he held in this school that at the time that he swore to that—that he signed that document and filed it with an agency of the Government that the goods were delivered and in the hands of the persons to whom they were supposed to have been delivered.

Now, you heard these boys come here on the wit-



ness stand and testify very frankly. They said at the time this voucher was filed, and on the back of this you will see the name of each one of these boys who appeared here in regard to the first voucher, which was filed for \$700 and some odd dollars. These boys appeared here and said they didn't receive those tools. They hadn't all the tools. They hadn't all been delivered.

They read from the document to refresh their memories as to that portion of the goods which they had not received—tools, and they had only received three books out of the \$25.00 worth which were supposed to have been furnished them.

Now, that is the question in this case. That is the whole question. It may seem immaterial to you. It is no pleasant duty for Mr. Flynn and myself to stand here, and the court, and prosecute a man but it is a duty that has to be performed. It has to be performed [157] by our office. It has to be performed by the court because if these things continually go on for all time, the filing of false vouchers with a Government agency, and the Government is very jealous of that particular charge—of the particular charge made in this indictment.

I believe that you folks on the jury, in the light of your own human experience, can realize what has happened in this particular case. I don't have to direct you. I don't have to argue with you about the matter.

I think you can see plainly that a man in the position he was then in at that particular time

should have known and did know that the goods which were supposed to have been delivered to these boys had not been delivered and yet he signed the vouchers in both instances, in Count One and Count Two, and presented to the Government a false claim for the full payment when the claim should have been for a lesser amount.

You will read both of these documents. I imagine there will be some argument by counsel for the defense that the voucher was filed for \$100 a piece for each one of these boys. The voucher in its entirety reads \$770. It explains there was a 10 per cent discount for handling charges. That was in addition to the charge that he charged for the boys when he hadn't delivered the full amount of books and tools. The Government still gave him \$70.00 [158] and there was a 2 per cent discount which brought the check down to \$754.60. That is what he received from the Government.

Under the testimony of the Government's witnesses, however, he only delivered to these students approximately \$1.65 worth of books and about \$58.00 worth of tools.

There is another thing in this instance. Mr. Kol-dewey's testimony, a representative of the Federal Bureau of Investigation who has no personal interest in this matter, talked to this defendant after this charge was presented and he told him that he knew that only about \$50.00 worth of goods and tools had been delivered to these boys, but that he expected them at some other time.

It doesn't make any difference when he expected them. When he signed that voucher and presented it to the Government he said to the Government "These goods were delivered to the place where they belonged." That is what makes it false. They hadn't been delivered according to all the testimony.

These boys had no interest in this matter either. They said they had only received a certain amount which they had been allotted and the school had been allotted for the purpose of books and supplies and tools for them to get an education in the particular line of work they were taking.

That is the charge in this case. It is very simple. You are the judges of the facts in this case. It is up [159] to you to determine what you believe from the testimony of all the witnesses, both for the Government and for the defendant, and it is your purpose in determining the guilt or innocence of this defendant. Thank you.

The Court: Mr. Wheeler.

### Argument on Behalf of Defendant

By Mr. Wheeler:

Your Honor and counsel and members of the jury Mr. Peterson would have you believe this is a rather simple case. It is true there is no use in rehashing the facts. They have been presented to you. The presentation of them shows this.

It shows, first, an individual acting for a corporation. You will find the stamp of the Arizona In-

stitute of Aeronautics on these vouchers and countersigned by G. Clifford Smith.

Now, we come to the first question and the judge will instruct you what is reasonable doubt under the circumstances and in these circumstances. And will also instruct what are the constituent elements of fraud.

We come to the first proposition: Was this particular act the act of an official or agent of the Arizona Institute of Aeronautics, a corporation? It is quite true—the judge made this statement and I at this time would like to express the defense's appreciation for the latitude we have had in [160] presenting our case. The judge made this statement that a corporation cannot be imprisoned, but the statute under which this was filed does make provision for fining a corporation.

Now, if this were the act of an individual, then we come down to G. Clifford Smith. If you can remove those elements from your mind we come down to the present indictment upon which he appears before you today.

It is immaterial and the judge will so instruct you, the fact that Smith is married and has children. That has no bearing upon this particular case. That has no bearing upon this indictment.

The Court: Counsel, the Court resents such statements. There is no evidence in this record to show that. It is an attempt by you to bring in a fact before the jury in order to create sympathy. There has been no evidence as to whether the de-

fendant is married or not or has children, and the Court doesn't want a repetition of that.

I want you to confine your argument to the evidence that has been introduced in this court.

Mr. Wheeler: Very well.

The Court: We are all sympathetic with anybody who finds himself in trouble.

Mr. Wheeler: Certainly, thank you.

The gist of this action then resolves itself to knowledge at the time these vouchers were [161] signed.

Now, you people are the sole judges of the credibility of the witnesses that have appeared before you. You have heard the routine in which these vouchers and the knowledge came to the various officers of this institution.

Upon you people now devolves the duty of determining whether Mr. Smith in his capacity as a director knew, prior to the submission of the vouchers, that part of the materials had not been delivered.

The prosecution brings out only one—one subject on that matter and that is Mr. Koldewey's statement. It was not amplified and I am not going to transgress the Court's reprimand again, but I will have you recall that Mr. Koldewey was testifying from his recollection of a conversation that took place several months prior.

The case rests with you, and I say honestly that the ramifications cannot be brought in. The attention you people have paid to the presentation and

the questions that have been asked I think have brought up the salient points and I think those are the points this case should be judged on. If it be judged that way, then we have no exception. Thank you.

The Court: Mr. Flynn.

### Closing Argument on Behalf of Plaintiff

By Mr. Flynn:

If it please your Honor, ladies and gentlemen of the jury. [162]

I will try to follow the good example set by the two counsel who preceded me and make my talk to you as brief as I can and at the same time perform the duty that I think is upon me in this case.

You know it is the duty of the United States Attorney or anyone representing the Government or State, or an individual in any sort of an obligation in arguing to the jury, to try to be of assistance to the members of the jury and not try to impose his thoughts or his opinions on the jury but to help the jury form their own opinion, and that is what I am going to try to do.

I am going to try to be of some assistance to you and I am not trying to get you to feel that I am telling you what I think and that is the way you ought to think. I am going to help you make up your minds based upon the evidence in this case.

You have an important duty to perform in this case. We have an important duty to perform. We



have to perform that duty irrespective of any sympathy and we try to perform it without any prejudice or feeling.

The court has a duty to perform in seeing that the evidence is introduced properly and then to instruct the jury on the law in the case. That is an important function of this court and that should be performed and has been performed in fairness to both the Government and the defendant.

Then the case is submitted to you and you have your duty to perform and that is the important part of this procedure because that is the final answer to this case. And in performing your duty you should perform it in a way that will be fair to the Government and to the defendant and not be influenced by any prejudice or by any feeling of sympathy or by anything outside of the evidence in this case. Your decision should depend upon the facts developed here by the witnesses and not upon anything you might imagine or conclusions you might draw without evidence to support it.

The court has said many times during this case and will probably instruct you as to the issues in this case, and the whole issue is very simple. It is whether or not this defendant signed and presented these two vouchers here to the Veterans Administration for the payment of money, knowing that they contained false statements.

There isn't any question but what he presented them so you don't have to worry about that. There isn't any question but what he signed them and there



can't be any question about that, and there can't be any question but that they were false because the evidence is practically uncontradicted here that at the time those vouchers were presented the material had not been furnished to the school, had not been purchased by the school and had not been furnished to the [164] individual students.

The only other element then for you to determine is whether or not the defendant had knowledge of the falsity of these vouchers.

Who was this defendant? Go back to the organization of this company, ladies and gentlemen, and you will find that he was the moving spirit. He was the man who conceived this idea of this school. He was the man who started it. And do you suppose he operated out there and managed that office out there and overseeing this work without knowing what was going on?

He admits, and the evidence is also uncontradicted, that when they purchased these materials, these tools from Sears Roebuck, they couldn't buy all that the list required. The defendant knew that.

Did he ever try to find out when he signed those vouchers, when he said he was so careful to go into the files and get out these receipts, did he make any effort to determine or find out if the things had changed (since he knew when he purchasd this stuff from Sears Roebuck) that he didn't get it all. He didn't have enough to furnish tools required.

Now, it is immaterial. There has been something said here about conducting the school. Maybe the

school didn't need these tools. This was an estimated amount of tools that they thought was needed for this instruction. It isn't [165] a question of whether the school could get along without them. It is a question of whether or not they were furnished to these boys or weren't furnished, and whether or not they put in the claim for them. That is the question. It doesn't make any difference. Maybe they could have gotten along with half the tools but that is immaterial. The question for you to determine is whether or not they put in a claim for something that they didn't furnish. That is all.

Now then I say this defendant said that he made an investigation. He went and got those receipts, but he didn't make any further investigation to find out if these tools had been received from Sears Roebuck. He knew they hadn't been received. You know that he knew they had not been received.

He told this Federal agent down in the jail at that interview in May or June that he had authority from the Veterans Administration to put in vouchers for tools before they were supplied. That is the testimony of this Government agent. And when the defendant was on the stand he was never asked to contradict that statement. He was on the stand and his counsel never asked him:

“Did you make the statement to the Government agent that you had authority?”

He took the stand, of course, and said he didn't have authority now because he knew that that theory of his defense would not sound reasonable to this

jury and so he didn't take [166] the stand and say that he had that authority. But he didn't deny that he made that statement to the Government agent.

If he made that statement to the Government agent. If the Government agent is speaking the truth, then this defendant has not told you the truth on the witness stand because if he told that Government agent that he had that authority in explaining why he presented those vouchers then he knew when he presented them that they were false and that the tools had not been supplied.

Ladies and gentlemen of the jury, I am ready to rest my case upon that statement; but if you don't believe the Government and believe this defendant the only thing you can do is go up to your jury room and bring in a verdict of not guilty. But if you believe the Government agent when he stated that the defendant made that statement to him then your duty is just as plain. You will go up to your jury room and return a verdict of guilty.

That evidence is corroborated also by this man Streicher who said he discussed, and it is natural that he would discuss the matter with the defendant out there, the man who was really running this school, that these tools had not been supplied and he was told to get a receipt from the boys and go ahead. It was all right. He had everything fixed up. Everything was all right, even the impression that the Veterans Administration didn't care. [167]

Now, that is the kernel of this case, ladies and gentlemen. It doesn't make any difference whether

they had tools out there sufficient to run this school. It doesn't make any difference how they were delivered—when needed or delivered at once. It doesn't make any difference. There is only one thing that does make a difference in this case and that is when he made out those vouchers did he know and I say from all the circumstances in this case we can't go into a man's mind and read his mind and say that he knew this or that he knew that.

The only way we can determine what he knew and what was his intent is by his actions and by his statements and by the surrounding circumstances. And I say every point of evidence in this case points to the fact that this defendant had knowledge that those tools had not been received by the school and had not been delivered to the school, and if that is true and he knew it he is guilty of this charge and it is your duty to find him guilty.

I submit it to you on that basis, ladies and gentlemen.

#### COURT'S INSTRUCTIONS TO THE JURY

Ladies and gentlemen, it now becomes my duty to instruct you as to the law of this case and under your oaths it is your duty to follow my instructions as to the law. In answering the court's questions when you were impanelled [168] you told me you would follow the court's instructions as to the law of the case and that is your duty.

I am to pass on the questions of law. Under the law I have a right to comment on the facts, but if in my instructions I appear to make any comment

that you consider comments on the facts and you do not agree with my comments, it is your duty to disregard them and not be influenced by them.

I am not going to intentionally tell you what I think about the facts, but I may in some of my comments seem to do so. If I do so you are instructed to disregard such comments because I feel that it is your function to determine the facts.

In the first place this action is brought under a provision of the law which reads as follows:

“Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent shall be punished as provided by law.”

As I stated there are really two issues here. There is no issue as far as the presentation and the execution of this claim is concerned. There is no dispute about that.

The issue is was the claim false and the second is did the defendant know that it was false. [169]

Therefore, the first problem you have to meet when you go to the jury room is to determine first whether the claim was false.

You have heard the evidence and after you have determined that question then you will determine: Did the defendant know the claim was false? That is all. Those are the only two questions.



Now, there has been some comment here about the corporation. The claim was that the defendant signed for and on behalf of the corporation. That is no concern of yours.

Under the theory that has been suggested here anybody that is representing a corporation could file false claims in the name of the corporation and yet they themselves could escape any liability for their misdeed.

So, you are not concerned with any corporation that may be involved and you are not concerned whether or not all the defendants who should be in this indictment are named. You are only concerned with this defendant. Whether there may be other indictments is none of your concern and it is none of your concern whether or not this defendant profited personally by the presentation of this claim.

I permitted the questions to go in and the answers to go in because I felt the facts should be brought before the jury, but whether this defendant personally profited or not is not a concern of yours. He is not charged with embezzlement. [170] He is not charged with stealing from the Government. He is charged with presenting a false claim.

And again I want to emphasize that as far as sympathy is concerned, if you permit sympathy to control your verdict in this case then you are violating your oaths. You are not concerned with the penalty. That is my problem if you find the defendant guilty. That is my problem and my worry and not yours.

I make these statements as a background for your approach as jurors in this case.

The indictment has been read to you and it is in two counts. It has been repeated and repeated and I am not going to read it again, but I want you to bear in mind that the two questions you are going to have to answer are these:

If you find that the claim was not false your verdict should be not guilty. You shouldn't go any further. If the claim was true and correct that ends it.

But if you should find it is false then you can pass to the second question. Did this defendant know it was false, and if he knew it was false then he has violated the statute that I have read to you.

I want to point out that by the finding of an indictment no presumption whatever arises to indicate the defendant's guilt or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the [171] proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.



A reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained [172] construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by

evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent [173] to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your ver-

dict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good [174] sense, consider the evidence for the purpose only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in

these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

You are instructed that knowledge is an element of the offense charged in the indictment, and that such knowledge must be established by the same degree of proof as any other [175] elements that enter into the completed offense.

It is psychologically impossible to enter into a man's mind and determine by testimony what the actual knowledge was so you must determine that knowledge from the facts disclosed by the evidence in this case, taking into consideration the conduct of the parties with relation to the matters charged and every circumstance which bears upon the issue keeping in mind a person intends by the natural consequences of his act, intentionally and knowingly done, and when you have considered all the acts of the parties, their relation to each other, the object to be attained, the things that are done, the circumstances under which they move, the motive which prompted the various acts so far as disclosed from the evidence, from all of these things you will determine what the intention of the defendant really was with respect to knowledge.

The verdict rendered must represent the considered judgment of each juror. In order to arrive at a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

When you retire to the jury room to deliberate you will select one of your number as foreman and he or she will act as your spokesman in the further conduct of this case in this court.

A form of verdict has been prepared for you in which you [176] will insert your findings of either guilty or not guilty to each of the two counts.

The indictment will be sent to the jury room so you may persue the charge if you are not already quite familiar with it.

I will ask if there are any exceptions to the instructions?

Mr. Wheeler: No, your Honor.

The Court: Both sides are satisfied?

Mr. Wheeler: Yes, your Honor.

Mr. Flynn: Yes.

The Court: Ladies and gentlemen, you will retire to the jury room with the bailiff and you may take the exhibits with you.

Mr. Wheeler: Will the jurors have access to the exhibits?

The Court: Yes. The bailiff will be sworn.

(Whereupon the bailiff was sworn and the jury retired from the courtroom at 4:10 o'clock p.m.)

The Court: I assume counsel will remain available.

Mr. Wheeler: We will be here, your Honor.

(At 5:00 o'clock p.m. the jury returned to open court where the following proceedings were had.)



The Court: Do you stipulate, gentlemen, the jurors are all present and in the jury box and the defendant is in court with his counsel? [177]

Mr. Wheeler: So stipulated.

Mr. Flynn: Yes, your Honor.

The Court: Ladies and gentlemen, you have been out now for about an hour and it is getting late. I understand you have not reached a verdict. I want to advise you that if there isn't a verdict by 5:20 o'clock I shall be available after dinner and up until 9:00 o'clock, providing the elevators here are running. If they make provisions for elevator service I will be available until 9:00 o'clock, otherwise I shall receive your verdict in the morning.

It might interest you to know that your conversations have been so loud in the jury room that you have been heard all over this portion of the building

It is very apparent the jury is paying very little attention to the court's instructions. You are arguing as to whether I am a tough judge or not and whether the entire outfit should be in court. Those are things I told you to stay away from. However those have been the subjects of your arguments.

I thought you might be interested to know that. We have heard everything you have said, particularly when your voices were raised. I am making these comments but you don't have to pay any attention to my instructions unless you want to and you are privileged to discuss me, but I don't happen to be the defendant in this case and I am not in-

terested in your [178] verdict except that you arrive at one.

I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time comfortable quarters will be provided for you in a hotel.

I am making this statement so you will understand why I can't stay here indefinitely and why provisions will be made for you.

With that you are instructed to retire to your jury room.

(Whereupon, at 5:05 o'clock p.m. the jury retired from the courtroom.)

(The following proceedings were had in the absence of the jury.)

The Court: Have you any comments?

Mr. Wheeler: No, your Honor.

(The jury returned to open court at 5:35 o'clock p.m. whereupon the following proceedings were had.)

The Court: Do you stipulate the jurors are present and in the jury box and the defendant is in court with his counsel? [179]



Mr. Wheeler: Yes, your Honor.

The Court: The bailiff advises me you have arrived at a verdict.

The Jury Foreman: Your Honor, they wish a statement made with the verdict if it is possible.

The Court: I will accept a statement by the jury. You may present your verdict to the clerk.

The Jury Foreman: The verdict is guilty but the jury feels he was a victim of circumstances in the case and should be shown leniency.

The Court: I can easily understand that request from the jury.

The clerk will read the verdict and then I will make my comment.

(Verdict read by the clerk.)

The Court: Is that your verdict as read?

The Foreman: Yes, your Honor.

The Court: Do you desire to have the jury polled?

Mr. Wheeler: No, not on the part of the defense.

The Court: I might say with reference to your statement I probably feel about the same toward the case and the defendant as you do because we are all human beings. I am glad to have your recommendation and I will take it into consideration in the disposition of this case.

I haven't looked upon it as so serious but I thought it [180] was important that you arrive at a verdict in the case and dispose of the case and not have it tried again with that expense to both parties.

I will be glad to take your recommendation into

consideration and I am going to refer the matter to the probation officer for report Thursday morning at 9:30.

The jury is excused until tomorrow morning at 10:00 o'clock.

(Whereupon the jury retired.)

Mr. Wheeler: May it please the court, bond has been posted in this case.

The Court: The defendant will remain at liberty on his bond.

(Whereupon, at 5:45 p.m. the above entitled matter was concluded.) [181]

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#### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 10th day of May, A.D. 1950.

/s/ JACK O. AMBROSE,  
Official Reporter.

[Endorsed]: Filed May 23, 1950. [182]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. Clifford Smith, Defendant, numbered C-11697 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the criminal docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the criminal docket entries and of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Criminal Docket Entries.

2. Commissioner's Record, filed June 3, 1949.
3. Indictment, filed June 16, 1949.
4. Defendant's Motion to Dismiss, filed November 8, 1949.
5. Minute Entry of February 14, 1950.
6. Defendant's Motion to Dismiss, filed April 10, 1950.
7. Minute Entry of April 10, 1950.
8. Minute Entry of April 11, 1950.
9. Verdict, filed April 11, 1950.
10. Government's exhibits 1, 2, 3, 4, 5 and 6 in evidence, filed April 11, 1950.
11. Defendant's exhibit A in evidence, filed April 11, 1950.
12. Reporter's Transcript of Proceedings.
13. Minute Entry of April 13, 1950.
14. Judgment, filed April 13, 1950. [183]
15. Notice of Appeal, filed April 20, 1950.
16. Application for Stay of Execution and Relief Pending Review.
17. Minute Entry of April 21, 1950.
18. Minute Entry of April 27, 1950.
19. Bond on Appeal, filed April 27, 1950.
20. Appellant's Designation of Record on Appeal, filed May 23, 1950; filed May 26, 1950.

21. Order extending time for filing and docketing of record on appeal, filed May 26, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 7th day of June, 1950.

WM. H. LOVELESS,  
Clerk.

[Seal] By /s/ CATHERINE A. DOUGHERTY,  
Chief Deputy. [184]

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[Endorsed]: No. 12573. United States Court of Appeals for the Ninth Circuit. G. Clifford Smith, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 10, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12573

G. CLIFFORD SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

### STATEMENT OF POINTS

Comes Now the above-named appellant and respectfully represents that his Appeal in the above-entitled and numbered matter is based upon the following points:

#### I.

The Trial Court Erred in Denying Defendant's Motion to Dismiss:

A. The proceedings had before the U. S. Commissioner and before the U. S. District Court were at variance concerning the elements constituting a violation of the respective criminal statutes and that the trial Court erred in denying defendant's Motion to Dismiss.

B. The trial Court erred in ruling that U. S. Code, Title 18, #287 replaced U. S. Code, Title 18, #1001.

C. The trial Court erred in denying defendant's Motion to Dismiss in that the certification of

defendant did not constitute either a making or presenting of a claim. (See Government's Exhibit #4 and Government's Exhibit #6.)

D. The trial Court erred in denying defendant's Motion to Dismiss in that no evidence was introduced to show that defendant "presented" the voucher.

E. The trial Court erred in denying defendant's Motion to Dismiss in that the amount of money stated in the indictment varied from that which appeared on the face of the voucher.

## II.

The Trial Court Erred in Excluding the Following Material Evidence Offered on Behalf of the Defendant:

A. The U. S. Manual, U. S. R. and P., governing the application of Public Law No. 346 and of Public Law No. 16. (Veterans' Administration.)

B. Vouchers submitted by the contracting party, Arizona Institute of Aeronautics, Inc., prior to March 18, 1949.

C. Vouchers submitted by the contracting party, Arizona Institute of Aeronautics, Inc., after March 18, 1949.

D. Testimony and other evidence concerning the internal affairs of the Arizona Institute of Aeronautics, Inc., (the contracting party) having a direct bearing upon the credibility, bias and motives of government witnesses.



E. Evidence concerning whether or not the contract of the Arizona Institute of Aeronautics, Inc., government's Exhibit #1, was subject to review and rejection by reviewing officers of the Veterans' Administration.

F. Evidence relating to the issue that the office of the Veterans' Administration did not initiate any proceedings against defendant or against Arizona Institute of Aeronautics, Inc.

### III.

The Trial Court Erred in Admitting in Evidence, Over the Objection of Defendant, Incomplete Records. (Government's Exhibit #2.)

### IV.

The Court Erred in Making Prejudicial Comments During Trial of Defendant.

### V.

The Court Erred in Recalling the Jury in That It Interfered With Its Deliberations and by Admonishments Influenced Its Verdict.

Respectfully submitted this 19th day of June, 1950.

/s/ IRVING KIPNIS,

Attorney for Appellant,  
G. Clifford Smith.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 22, 1950.